(14)

No. 89-1322-CFX
Status: GRANTED

Title: Oklahoma Tax Commission, Petitioner
v.
Citizen Band Potawatomi Indian Tribe of Oklahoma

Docketed:
January 29, 1990

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Miley,David Allen

Counsel for respondent: Minnis,Michael, Rabon,Bob

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Entry	Date	Note	Proceedings and Orders
1	Jan 29 1990	G	Petition for writ of certiorari filed.
2	Mar 22 1990		Brief of respondent Citizen Band Potawatomi Indian Tribe of Oklahoma in opposition filed.
3	Mar 28 1990		DISTRIBUTED. April 13, 1990
5	Apr 16 1990		REDISTRIBUTED. April 20, 1990
7	Apr 23 1990		REDISTRIBUTED. April 27, 1990
8	Apr 30 1990	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Aug 13 1990		Brief amicus curiae of United States filed.
9	Aug 15 1990		REDISTRIBUTED. September 24, 1990
11	Sep 17 1990	X	Supplemental brief of respondent Citizen Band Potawatomi Indian Tribe of Oklahoma filed.
12	Oct 1 1990		Petition GRANTED. **********
13	Oct 15 1990	G	Motion of petitioner to dispense with printing the joint appendix filed.
14	Oct 29 1990		Motion of petitioner to dispense with printing the joint appendix GRANTED.
15	Nov 9 1990		Brief of petitioner Oklahoma Tax Commission filed.
16	Nov 14 1990		Record filed.
		*	Certified copy of original record on appeal and proceedings received.
17	Nov 15 1990		Brief amicus curiae of United States filed.
18	Nov 23 1990		SET FOR ARGUMENT MONDAY, JANUARY 7, 1991. (2ND CASE)
20	Nov 27 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Nov 29 1990		CIRCULATED.
21	Dec 10 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Dec 12 1990		Lodging received. (11 copies).
23	Dec 12 1990	X	Brief of respondent Citizen Band Potawatomi Indian Tribe of Oklahoma filed.
24	Dec 12 1990	X	Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma, et al. filed.
25	Dec 12 1990	X	Brief amici curiae of Sac and Fox Nation, et al. filed.
26	Dec 12 1990	X	Brief amici curiae of Seneca-Cayuga Tribe of Oklahoma, et al. filed.

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No. 89-1322-CFX

Entry	Date	Note	Proceedings and Orders
27	Dec 12 1990		Brief amicus curiae of Iroquois Businesspersons Association filed.
28	Dec 12 1990		Brief amicus curiae of Inter-Tribal Council of the Five Civilized Tribes filed.
29	Dec 26 1990	X	Reply brief of petitioner Oklahoma Tax Commission filed.
30	Jan 7 1991		ARGUED.

89-1322

No._____

In The Supreme Court of the United States OCTOBER TERM,1989

OKLAHOMA TAX COMMISSION, PETITIONER

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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51P

PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether an Indian tribe may operate a business, open to the general public, selling cigarettes and other items without complying with any applicable State tax law by virtue of the Sovereign Immunity Doctrine.

2. Whether the State may enforce compliance of State tax laws against a tribally-owned business by way of assessment for delinquent taxes against the Indian tribe or by a lawsuit to enjoin the tribal business activity until taxes are properly paid.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Oklahoma Tax Commission, and the respondent, Citizen Band Potawatomi Indian Tribe of Oklahoma. Cindy Rambo, Chairman of the Tax Commission; Robert L. Wadley, Vice-Chairman of the Tax Commission; and Don Kilpatrick, Secretary of the Tax Commission, were named in the procedings below as defendants-appellees/cross appellants in their official capacities as members of the Oklahoma Tax Commission, petitioner herein.

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In The
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OKLAHOMA TAX COMMISSION, PETITIONER

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 3, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 888 F.2d 1303, and is reprinted in the Appendix hereto, page A-1, *infra*.

The Judgment of the United States District Court for the Western District of Oklahoma (West, D.J.) has not been reported. It is reprinted in the Appendix hereto, page A-9, *infra*. The Order of the District

Court is not reported and is reprinted in the Appendix at page A-12, *infra*.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on November 3, 1989. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Title 28 United States Code §1254(1) is set forth in the Appendix at page A-26. The Federal jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Plaintiff below is a federally recognized Indian Tribe. Title 28 U.S.C. §1362 is set forth in the Appendix at page A-25.

STATEMENT OF THE CASE

1. NATURE OF THE CONTROVERSY

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Tribe hereafter), a federally recognized Indian Tribe, owns and operates a convenience store which is open to the general public and from which the Tribe sells large quantities of cigarettes and other convenience store items. The tribal store is located on a tract of land within Pottawatomie County in Shawnee, Oklahoma which is held by the United States in trust for the Tribe. The Tribe had acquired the land, containing approximately 280 acres, from the United States in fee, unrestricted as to Indian ownership and taxable under the Act of September 13, 1960, 74 Stat. 903, and the Act of August 11, 1964, 78 Stat. 392. Subsequently, on May 27, 1976, the Tribe conveyed the land to "the United States of America in trust for the Citizen Band of Potawatomi Indians of Oklahoma" pursuant to the Act of January 2, 1975, 88 Stat. 1922.

Oklahoma law requires all vendors of tangible personal property, including cigarettes, to collect and remit state and local sales taxes (4% State plus 2% or 3% local) to the Oklahoma Tax Commission (State hereafter), 68 O.S. §1361. In addition, cigarette excise taxes are imposed on the consumer of cigarettes at the rate of $2.30 per carton of 10 packages containing 20 cigarettes each, 68 O.S. §§302, 302-1, 302-2, 302-3, 302-4. Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor from the State and affixed to each package of cigarettes sold. If a vendor sells cigarettes without affixing the excise tax stamp, the vendor will be liable to pay the State a sum equal to twice the amount of the tax due, 68 O.S. §305(c). If any on vendor fails to comply with the State's Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code, the Tax Commission shall determine the correct amount of tax due and issue an assessment for those taxes to the vendor by letter pursuant to 68 O.S. §221, and thereafter commence collection procedures. If a vendor continues to operate a business without paying the taxes imposed by State law, the State may institute any action necessary to enjoin such vendor from operating that business within Oklahoma, 68 O.S. §232.

The Tribe has sold and continues to sell, cigarettes and other taxable items from its place of business within the State of Oklahoma to the general public without regard as to whether its customers were tribal members or not. The Tribe does not collect the applicable State taxes on any of its sales and does not comply with the Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code in any respect. Based upon the Tribe's business activity, the State issued an assessment letter to the Tribe on March 4, 1987, in the amount of $2,691,470.70 for the sale and distribution of unstamped cigarettes, reprinted at page A-23.

2. THE PROCEEDINGS BELOW

After the State issued the assessment letter, the Tribe brought an action against the State in the United States District Court for the Western District of Oklahoma to enjoin the State from enforcing any State tax law against the tribal business and from assessing the Tribe for delinquent cigarette taxes. The jurisdiction of the District Court

was invoked under 28 U.S.C. §1362 because the plaintiff is a federally recognized Indian tribe.

The State answered and brought a counterclaim pursuant to Rule 13 (a) and Rule 18 (a) of the Federal Rules of Civil Procedure seeking declaratory and injunctive relief, declaring that State tax laws do apply to the tribal business and may be enforced against the Tribe and enjoining the Tribe from operating its business until it fully complies with State tax laws.

The District Court entered its judgment (page A-9) in this case May 6, 1988 in accordance with its Order of April 15, 1988 (page A-12). The District Court found that it had jurisdiction of both the complaint and the counterclaim and ordered that the Tribe is immune from the application of State tax laws and therefore the State is enjoined from enforcing its tax laws against the Tribe, and from assessing the Tribe for delinquent taxes or collecting taxes from the Tribe. However, the District Court found that the land upon which the store was located was an Indian reservation under 18 U.S.C. §1151 and therefore, sales to tribal members were exempt from State taxation but sales to non-tribal members were subject to State taxes and the Tribe must aid the state in collecting these taxes under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). Both litigants appealed this decision.

On Appeal, the Tenth Circuit first held that (1) the Tribe enjoyed sovereign immunity from unconsented suit, citing *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977); (2) Rule 13(a) of the Federal Rules of Civil Procedure did not waive the Tribe's immunity; and (3) the District Court lacked jurisdiction to adjudicate the counterclaim. The Court therefore reversed the trial court's denial of the Tribe's motion to dismiss the State's counterclaims and directed the lower court to dismiss all counterclaims against the Tribe.

The Appeals Court then found that the land where the tribal store is located was an Indian reservation and thus, "because the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." The Appeals Court found that no such jurisdiction exists and rejected the State's citation of authority to this Court's opinions in *Moe* and *Colville* for the State's proposition that the Tribe must collect the State's taxes. The Court ruled that the Tribe was not amenable to any State law under the doctrine of sovereign immunity and imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or enforcing any tax law against the Tribe and its business.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision which is in conflict with applicable decisions of this Court by enjoining the State from enforcing its tax laws or collecting its taxes against the Tribe. The Tenth Circuit has fabricated a theory of absolute and unqualified sovereignty for the Tribe to which the State is subjugated, and for the purpose of clothing the Tribe with the power to sue, and not be sued; the power to make law, and be subject to no law; and the power to exercise unknown rights, while ignoring the existing rights of others. In that the Appellate Court's opinion is a misconceived product of the personal emotions or political reactions of its individual members, it may be forgiven, but cannot be condoned in light of the contrary opinions of this Court which hold that tribal sovereignty is much more limited.

The lower court's opinion should not only be reviewed for its error, but also because of its far reaching and debilitating effect on the administration of State government and law, and its trenchant effect on the business community which must compete in the marketplace against a competitor who is unburdened by the expense of State regulation. Because of the importance of this case to State government, and because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE TENTH CIRCUIT'S OPINION WHICH LIBERATES THE TRIBALLY-OWNED BUSINESS FROM ANY RESPONSIBILITY TOWARD STATE LAW IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE OKLAHOMA SUPREME COURT.

The foremost judgment in the Tenth Circuit's opinion of this case is the express rejection of the controlling authority of this Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The *Colville* case is directly on point with the case at bar. The Indian tribes in *Colville* were selling cigarettes to the public at large within the State of Washington without collecting the State's taxes and were thereby able to sell their cigarettes at deep discounts, compared to the price of taxed cigarettes, which afforded the tribal stores an artificial competitive advantage over all other businesses in the State which, in turn, translated into abnormally large sales of cigarettes for the tribes. This Court found that since the tribal smokeshops were located on the Colville Indian Reservation, the tribes could sell products to the reservation tribal members free of state taxation, however, all sales by the tribes to non-tribal members were fully taxable by the State, which taxes must be collected by the vendor from the consumer and properly remitted to the state pursuant to state law.

The only difference between the present case and *Colville* is that the Potawatomi Tribe does not inhabit a federal Indian reservation as the tribes in *Colville* did. In fact, there are no federal Indian reservations within the State of Oklahoma, nor have there ever been any such reservations since Oklahoma statehood in 1907. Rather, the tribal store in the present case is located on Indian Trust land, that is, land held in trust by the United States for the benefit of the tribe under 25 U.S.C. §501.

This distinction is important because this Court has held that tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. This holding was rendered by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). In the *Mescalero* case, this Court found that New Mexico's gross receipts tax was properly enforced against the Tribe's ski resort which was located on the Tribe's trust land outside of the Tribe's reservation boundaries and the Tribe was therefore liable to pay state taxes on its gross receipts in the amount of $26,086.47. The *Kake* decision dealt with the State of Alaska's enforcement of the state anti-fish trap law against the Indian tribe in violation of the state law. This Court found that the fish traps were not operated on an Indian reservation and therefore the state could properly enforce its law against the tribe by seizing the tribe's fish traps and arresting the individuals who were operating them.

In contrast to an off-reservation situation, activities by reservation Indians on the reservation are treated differently. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court ruled that the State of Arizona could not tax the income of a Navajo Indian who resided and earned her income exclusively within the Navajo Reservation in that State because such taxation would infringe on the right of reservation Indians to govern themselves. But what is most significant about the *McClanahan* case is what the case does not involve. At 411 U.S. 167-168 this Court stated:

> We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government...Nor are we concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations...Nor finally is this a case where the State seeks to reach activity undertaken by reservation Indians on nonreservation lands. (Citations omitted).

This Court concluded at 411 U.S. 181; "This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws

and be ruled by them'," (the Court's emphasis). The Court ruled three years later in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that state taxation of cigarette sales by an Indian tribe on the reservation to non-Indians does not violate this right and reiterated that decision with emphasis in *Colville*. All of these cases illustrate that sales of cigarettes by a tribe either on or off of a reservation are taxable by the state.

The Tenth Circuit's opinion is in conflict with all of the opinions of this Court cited above. In Section II of the Tenth Circuit opinion, the Court permanently enjoined the Tax Commission from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe. The Tenth Circuit plainly ruled contra to *Colville* that the tribe's sales of cigarettes to the general public are immune from state taxation. There is no authority for this opinion.

The Tenth Circuit analyzed this case by first finding that the tribal store is located within an Indian Reservation by holding at page A-5 that, "Lands held in trust by the United States for the Tribes are Indian Country within the meaning of Section 1151(a)," citing *Cheyenne-Arapaho Tribe v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980), (18 U.S.C. §1151(a) defines Indian Country as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation"). This holding is plain error in light of the reality that federal Indian reservations are either created by Congressional enactments or executive orders of the President, but never by judicial decree. In this case the Tenth Circuit never cited an Act of Congress or executive order to sustain its holding. Certainly the statutes which authorize land to be transferred to the United States in trust for a tribe, 25 U.S.C. §§465, 501, do not provide for any reservation status for such land. In the *Mescalero* case, this Court declined to treat such trust land as having reservation status and ruled at 411 U.S. 155, 156 that "On its face, the statute exempts land and rights in land, not income derived from its use," and, "Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax

simply because the land from which it is derived, or its other source, is itself exempt from tax." See footnote 11 at 411 U.S. 155. The Tenth Circuit dismissed the authority of *Mescalero* as distinguishable, see page A-6.

After finding that the land was "Indian Country," the Tenth Circuit concluded, at page A-7, that, "Because the convenience store is located in Indian Country, the Potawatomis possess sovereign powers with respect to the land and the store." Therefore, the Appeals Court found that Oklahoma has no authority to tax the store's transactions under the theory of sovereign immunity. However, the Tenth Circuit was obliged to overcome one last hurdle to reach its central finding, that hurdle being the controlling precedent of the *Colville* case which ruled that the tribal business was responsible for state taxes.

The Tenth Circuit avoided the result in *Colville* by reasoning that in *Colville* the Indian tribe had opted to come under state jurisdiction pursuant to Pub.L.No. 83-280. (This law is commonly referred to as PL 280 and is codified at 28 U.S.C. §1360 and 25 U.S.C. §1322 for civil jurisdiction and 18 U.S.C. §1162 and 25 U.S.C. §1321 for criminal jurisdiction.) The case at bar differs from *Colville*, thought the appeals Court, in that Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, did not assert jurisdiction under PL 280, and, not surprisingly, there is no voluntary grant of jurisdiction by the Tribe. The State submits that the Tenth Circuit's reasoning is faulty, first because this Court never relied on PL 280 for its holding in *Colville*, nor even mentioned the law, rather the *Colville* opinion was based on this Court's reasoning that the State's taxation of its own citizens on transactions occurring within a federal reservation did not infringe on the Tribe's right to self-government and was not federally pre-empted. Secondly, Oklahoma's disclaimer clause and PL 280 do not spell tax immunity for Indians in Oklahoma.

The Oklahoma Enabling Act, 34 Stat. 267 at Section 3, required the disclaimer provision to be placed in the Oklahoma Constitution. The Constitution provides at Art. I §3 that the State disclaims all right and title to all lands within the State held by any Indian, Tribe, or

nation. Such disclaimer language was construed by this Court in *Organized Village of Kake* at 369 U.S. 67-69, which states that a disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interests. The Court stated that the test of whether a state law could be applied on Indian reservations was whether the application of that law would interfere with reservation self-government. The Congressional intent and understanding of the disclaimer language was expressed in Senate Hearing reports and is stated at 369 U.S. 69, as follows:

> The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on those lands, as long as that does not affect the title to the land.

The Oklahoma Supreme Court has likewise construed the disclaimer in Okla. Const. Art. I, §3 as a disclaimer of proprietary rather than governmental interests in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 87. Contrary to the Tenth Circuit's ruling below, the disclaimer language does not free the Tribe from responsibility toward State laws.

Next, PL 280 is not a bar to State jurisdiction and has no application to the State of Oklahoma. This Court has ruled in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1980), that Congress' primary concern in enacting PL 280 was combatting lawlessness on reservations. This specific problem was solved in Oklahoma by the Dawes Commission when all reservations were disestablished prior to Statehood with a view to the ultimate creation of a state for the Union. The history of the Dawes Commission is related in the case of *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), which details the disestablishment of the reservation system to create the State of Oklahoma.

At any rate, PL 280 is not a license for the Tribe to make untaxed goods and services available to the citizens of Oklahoma in violation of State and Federal law. It should be pointed out that not only does the *Colville* decision require the Tribe to sell State tax paid cigarettes,

but also the Trafficking in Contraband Cigarettes Act, 18 U.S.C. §2341 et seq. makes it unlawful for any person to possess, sell or distribute contraband cigarettes, i.e. cigarettes which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found. This law does not exempt Indians or Indian Tribes from the proscribed conduct. Furthermore since PL 280 was intended to facilitate, not impede, a state's jurisdiction, it is inconsistent with that intent for the Tenth Circuit to use the statute to bar the State's right to collect its valid taxes.

The lower Court's opinion barring the State's attempt to enforce its taxes by assessment or counterclaim against the Tribe also brings the Tenth Circuit into conflict with the Supreme Court of Oklahoma's opinion in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985).

In the *Seneca-Cayuga* opinion, the State Supreme Court ruled that sovereignty is not a bar to state jurisdiction, although states must meet the modern tests for measuring infringement upon tribal self-government and federal pre-emption. Since the Tenth Circuit has made the broad ruling that tribal sovereignty is a bar to state jurisdiction for any purpose, the Tax Commission is faced with attempting to administer state laws in light of two controlling but diametrically opposed Appellate Court opinions. Because the Tenth Circuit has rendered an opinion on an important question of federal law in conflict with a state court of last resort and in conflict with applicable decisions of this Court, the State requests this Court to review the decision of the Tenth Circuit.

II. THE DECISION BELOW ERRONEOUSLY APPLIED THE DOCTRINE OF SOVEREIGN IMMUNITY TO DISPOSSESS THE STATE'S POWER TO TAX ITS CITIZENS, WHICH RAISES IMPORTANT PROBLEMS THAT UNDULY BURDEN THE ADMINISTRATION OF STATE LAW.

The Tenth Circuit ruled in Section I of its opinion, at page A-3, that Indian tribes enjoy sovereign immunity from suits to which they

do not consent and therefore the State could not bring a counterclaim against the Tribe under the authority of *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977). The result being that even though the State does have the right to have its valid taxes collected, the State cannot enforce its right against the Tribe under the Tenth Circuit's sovereign immunity theory.

In its basic form, this case involves the struggle of the lower courts and the litigants to find the outer limits of tribal sovereignty and its place within the federal system. The Tenth Circuit's opinion recognizes that the Tribe maintains unqualified sovereignty over the State which is co-extensive with that of the United States. The State suggests that the Tribe's sovereignty is not of the same dignity as that of the United States but is rather limited to the tribal courts, concerning matters within the scope of the Tribe's internal and social relations.

In *United States v. United States Fidelity and Guarantee Co.*, this Court ruled:

> The public policy which exempted the dependant as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.

The *U.S.F. & G.* case offers a straightforward approach to the sovereignty doctrine. However, in light of more recent opinions, the case at bar is an appropriate case to re-examine the merit of that doctrine. Furthermore, the doctrine was applied to circumstances in the *U.S.F. & G.* case which are different than the circumstances presented today. Therefore, the *U.S.F. & G.* case does not resolve the problems facing the State and the Tribe today because it is a maxim not to be disregarded that general expressions, in every opinion, are

to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated, *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821).

The *U.S.F. & G* case involved the litigation of coal mining contracts entered by the United States in its governmental capacity on behalf of the Indian Tribes. The United States, as trustee, on its own behalf, and on behalf of the Indian Tribes, brought the lawsuit to seek payment on a bond put up by the mining companies to insure royalty payments. The United States had an interest in collecting the bond due to its statutory duty to conserve and manage the Tribe's mineral resources as the trustee of those resources. This Court, therefore, would not allow an end run around the sovereignty of the United States by an attack, through the defendant's crossclaim, against the tribal wards which would deplete those federally protected tribal resources. Since the Federal Government's interest was being litigated and the United States was suing in its own name to protect that interest, the immunity of the United States attached to the tribal beneficiaries. *U.S.F. & G.* is therefore more illustrative of the sovereignty of the Federal Government rather than of the tribal government.

In the case at bar, the United States is not a party and no federally protected rights are involved or are being infringed. The Federal Government takes no responsibility for the actions of the Tribe or the operation of the tribal business. The United States only holds the subject tract of land for the Tribe in trust, but title to the land is not in question. The Federal Government has no interest in the tribal business and has no duty to manage the affairs of the enterprise. Yet the Tenth Circuit seizes upon the language in *U.S.F. & G.* to rule that an Indian Tribe may operate businesses in Oklahoma without regard to State law and make untaxed goods and services available to Oklahoma citizens.

It must be conceded that this Tribe may maintain its own self-government over its internal relations which will never be disturbed by a state law. But the Tribe cannot be allowed to destroy the integrity of the State tax system by wholesale evasion of State taxes and thereby disturb the internal relations of State government. Although this Court has ruled that the Tribe is subordinate to only the Federal Government, not the States, likewise, the States are subordinate to only the Federal Government, and not the Tribe.

It is axiomatic that taxes are indispensable to the support of State Government because the State does not operate convenience stores, smokeshops or bingo halls to raise revenue. The State of Oklahoma pays for government through taxation of its citizens. Under the Tenth Circuit's Order, the Tribe will be able to operate any business itself or to enter into management agreements, leases, licenses or permits with anyone to operate the tribal business on its behalf without collecting taxes. The Tenth Circuit's Order has thus placed whole areas of state taxation beyond the reach of State jurisdiction, thereby restructuring Oklahoma's taxing system by decree.

Although the Tribe has the right to govern itself without state interference, that right does not allow the Tribe to rearrange state laws to fit its own purposes to the detriment of the citizens of the State of Oklahoma. The Tribe may operate free from state control within its own sphere, but outside of that sphere of internal jurisdiction, when the Tribe enters the general business community, the tribal enterprise steps into the reach of state law. The Tribe may avoid that reach by not operating a business within Oklahoma, but it may not avoid that reach by way of absolute sovereignty because this Tribe does not possess absolute sovereignty. When a Tribe enters the economic community of this State to operate a business in competition with all other businesses, it must abide by the state laws that govern commercial activity which impose the duties and responsibilities which all businesses owe to their communities.

In this regard as a matter of public policy, when a Tribe operates a business and uses the protections, facilities, and work force of the state in order to make money from the custom of the local community,

the Tribe should be responsible for the liability that it accrues because business has always been required to pay its own way. When the Tribe enters the State to conduct a business, there is no authority that entitles the Tribe to stand differently from any other businessman. It avails itself of the machinery furnished by the State and it should contribute in the same proportion that every other businessman contributes for the privileges that it uses. It has no better or other right to use them than anyone else. "The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal," Justice Holmes dissent in *Panhandle Oil Co. v. State of Mississippi*, 277 U.S. 218, 224 (1928).

In this case, the State's interests lie in collecting a tax from its citizens as prescribed by the State Legislature. The tribal interests lie in the economic development of its business for the profit of the Tribe. The State would submit that requiring the Tribe to comply with State tax laws will fulfill the State's interests and will not prevent the Tribe from sustaining its economic development just as it does not prevent all other businesses from realizing a profit.

For these reasons, the viability of the Tribe's absolute sovereign immunity theory has been tested in recent cases and this Court has abrogated the doctrine of sovereign immunity for Indian tribe's in the area of state taxation in order to accommodate the legitimate and compelling interests of the State to collect its valid taxes. The sovereignty doctrine, as a bar to state jurisdiction has been replaced with a reliance on federal pre-emption or infringement of self-government.

This is not to say that an Indian tribe has no sovereignty as a government, rather, the sovereignty of a tribe is limited to its internal relations and does not reach so far as to dispossess a state's ability to tax its own citizens. This limited sovereignty is difficult to characterize because it is a function of, or is dependent on, the Federal Government's relationship to the tribe. Therefore a tribe is really not sovereign at all, which makes a traditional application of the doctrine impossible.

The sovereign status of an Indian tribe was described by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) at 55:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government...Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations" ... They have power to make their own substantive law in internal matters...and to enforce that law in their own forums. (Citations omitted).

In *Martinez*, this Court held that a tribal member could not sue her tribe in federal court for civil rights violations stemming from the tribe's denial of membership to her children. This Court also upheld tribal sovereign immunity in *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977), wherein the State of Washington was barred from regulating salmon fishing by Puyallup tribal members on the Puyallup Reservation. These two cases precisely make the point. The *Martinez* and *Puyallup* decisions uphold tribal sovereignty in matters involving *internal tribal affairs and self-government* or *on-reservation activity of the tribe and its members*. These decisions do not provide that an Indian tribe enjoys absolute and unqualified sovereignty over the government of the State of Oklahoma. A tribe may enjoy sovereign immunity in its own courts, but it does not enjoy sovereign immunity in this Court.

As explained by this Court in *Nevada v. Hall*, 440 U.S. 410 (1979), the doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the Courts of another sovereign. As stated by Justice Holmes, sovereign immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." This Court found that this explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and

authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

As stated, this Court has abrogated the doctrine of sovereign immunity for tribes in cases involving state action which do not infringe tribal self-government. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), state inheritance taxes were held applicable to estates of Indian tribal members that did not live on reservations. The cases of *Ward v. Race Horse*, 163 U.S. 631 (1896) and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) hold that a State may regulate hunting and fishing of the tribe or its members off of an Indian reservation. The companion cases of *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), hold that Indians living and earning their income exclusively on an Indian reservation are not subject to state taxation, however, Indians and Indian tribes who undertake activities on nonreservation land are subject to state taxation and the full extent of state law applicable to those activities. Finally, activity by non-Indians on an Indian reservation is subject to state laws, *Thomas v. Gay*, 169 U.S. 264 (1898), and tribally owned businesses on the reservation which trade with non-tribal members are responsible for state taxes applicable to those transactions, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), *Rice v. Rehner*, 463 U.S. 713 (1983).

These cases illustrate the limits of the so-called "Indian sovereignty doctrine." Under the doctrine a tribe may not be sued concerning internal matters of tribal government or for on-reservation activity. The present case contains neither of these conditions which would afford immunity to the tribe. There is no authority to allow a tribe to operate a business within this State and without complying with state law. An Indian tribe enjoys no immunity from state laws, rather, the claimed immunity is only a function of the Federal Government's authority over federal lands such as Indian reservations. Therefore, the case does not turn on whether state laws may be

applied against an Indian tribe because clearly, they can be so applied. The case turns on whether federal law has pre-empted state law or whether state action has infringed tribal self-government.

Although the Tax Commission is concerned in this lawsuit with the administration of the State's tax laws, the effect of absolute sovereignty of a tribal business is even more far reaching than the State's interest in taxation. The State is also interested in the protection of the life and property rights of its citizens. If the State cannot sue the Tribe for taxes, it would follow that the Tribe would not be responsible to the State workers compensation or unemployment compensation laws. And neither would the Tribe be answerable for damage that it might cause to patrons of the tribal business or to other businesses with which it deals. The State simply suggests that the Tribe may operate its government in any way that it sees fit, however, if the Tribe operates a business in this State, it must obey applicable state laws.

The Tenth Circuit's Opinion is based entirely on the theory that an Indian tribe maintains absolute and unqualified sovereign immunity from suit, to the end that the Tribe in this case may operate a business in violation of state laws. The Tenth Circuit has no authority for this holding and has decided an important question of federal law in such a way that adversely affects the State's ability to tax its citizens, which decision is in conflict with applicable decisions of this Court.

CONCLUSION

Because the Tenth Circuit Court of Appeals has decided an important question of federal law in conflict with decisions of the highest Court of the State of Oklahoma and in conflict with applicable decisions of this Court, review by this Court is urgently required. For these reasons, a writ of certiorari should issue to review the Order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,
OKLAHOMA TAX COMMISSION
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ATTORNEYS FOR PETITIONER

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff-Appellant/ Cross-Appellee,	)	
v.	)	Nos. 88-2160
THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice Chairman of the Tax Commission; and DON KILPATRICK, Secretary of theTax Commission, Defendants-Appellees/ Cross-Appellants.	)	88-2172

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-87-0338-W)

Michael Minnis (David McCullough with him on the briefs) of Michael Minnis & Associates, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellant/Cross-Appellee.

David Allen Miley, Assistant General Counsel, Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendant-Appellee/ Cross-Appellant.

Before McKAY, BARRETT, and SEYMOUR, Circuit Judges.

McKAY, Circuit Judge.

This case revolves around an attempt by Oklahoma to tax cigarettes sold by the Citizen Band Potawatomi Indian Tribe of Oklahoma (the "Potawatomis" or the "Tribe") in a convenience store which the Tribe wholly owns and operates. The store was constructed with federal funds and located on land held in trust by the federal government which is "exempt from State and local taxation." 25 U.S.C.A. §465. In February of 1987 the Oklahoma Tax Commission sought to collect state cigarette taxes from the Indian tribes and their licensees. In moving against the Potawatomis, Oklahoma served a $2.7 million assessment letter on the Potawatomis' Business Committee Chairman, who would be personally liable if Oklahoma prevailed. The Potawatomis immediately sought an injunction in the district court of Oklahoma to prevent this. Oklahoma then revoked the assessment against the Chairman and proceeded against the Tribe itself.

The trial court granted the Potawatomis a preliminary injunction and enjoined Oklahoma from enforcing the cigarette tax against the Tribe, pending this suit. Oklahoma asserted a counterclaim asking the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma had jurisdiction to tax the Potawatomis' sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted.

In response, the Potawatomis moved to dismiss Oklahoma's counterclaim, arguing that the trial court lacked subject matter jurisdiction over the claims raised in the counterclaim. The Potawatomis argued further that the court lacked jurisdiction over the Tribe because the Tribe enjoys sovereign immunity and cannot be sued unless the Tribe consents. The trial court denied the Potawatomis' motion to dismiss on the ground that the counterclaim was a compulsory counterclaim under Fed. R. Civ. P. 13(a) and that it "needs no independent jurisdictional basis." Moreover, the court held that the Potawatomis had waived their sovereign immunity noting that the "relief sought by the defendants [Oklahoma] is so intertwined with the relief sought by the plaintiff [Potawatomis] that the counterclaim falls

within the scope of waiver contained in the plaintiff's complaint." Document No. 32, Order, filed May 29, 1987, at 3-4.

The Potawatomis filed a motion for a new trial, contending that Fed. R. Civ. P. 13(a) was not a congressional waiver of the Potawatomis' sovereign immunity. The trial court denied the Tribe's motion, and they appeal both the denial of their motion to dismiss and their motion for a new trial. The Potawatomis also claim error in the trial court's ruling that sales of cigarettes to nontribal members may be taxed. Oklahoma cross-appeals claiming that the court erred in holding that the Tribe and its members who purchase cigarettes are tax exempt.

Here, the district court's denial of the Potawatomis' motions to dismiss and for a new trial present primarily questions of law. As an appellate court, therefore, we review *de novo* the district court's rulings on those motions. *See, e.g., Morgan v. city of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986); *In Re Tri-State Equipment, Inc.*, 792 F.2d 967 (10th Cir. 1986); *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986).

I. *Tribe's Motion to Dismiss Counterclaim*

Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress. *See United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 172-73 (1977). The Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely be filing as a plaintiff. *See Fidelity and Guaranty Co.*, 309 U.S. at 513. "Although the precise limits of this tribal immunity are not clear, . . . it is generally coextensive with that of the United States." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

In *Chemeheuevi Indian Tribe v. California Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985), the Ninth Circuit held:

> [T]he compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a congressional waiver of the Tribe's immunity. . .
>
> . . . Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately. The authorizing statute for the Federal Rules of Civil Procedure specifies that the rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072 (1982). We cannot find that a rule promulgated pursuant to this statute was intended impermissibly to abridge the Indian tribes' substantive right to immunity from suit. Nor can we read Rule 13(a) in isolation and extend federal jurisdiction despite the repeated specification that the rules are not intended to have such an effect.

Chemeheuevi Indian Tribe, 757 F.2d at 1053.

Relying on *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), the trial court believed it also had jurisdiction based on the principle of "recoupment." Recoupment, however, is an equitable defense that applies only to suits for money damages. "[R]ecoupment is purely defensive and not offensive . . . [and applies] only to the abatement, reduction, or mitigation of the *damages* claimed by plaintiff." 80 C.J.S. *Set-Off and Counterclaim* §2 (1953) (emphasis added).

The Potawatomis sought only injunctive relief in this suit. They did not ask for a declaratory judgment or damages. The Ninth Circuit has held that "[a]lthough a counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent." *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970). The judgment of the district court gave Oklahoma affirmative relief. Oklahoma obtained a declaratory judgment for part of the relief they sought in their counterclaim. This is

contrary to the sovereign immunity doctrine and is an impermissible exercise of the trial court's jurisdiction under *Schaumburg v. United States*, 103 U.S. 667 (1881).

Because the Tribe is immune from suit, the district court lacked jurisdiction to adjudicate the counterclaim. We therefore reverse the trial court's denial of the Potawatomis' motion to dismiss Oklahoma's counterclaims and remand with directions to dismiss the counterclaims.

II. *Tribe's Request for Injunction*

The Potawatomis sought an injunction that "[p]ermanently enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concern or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees . . . ." We conclude that the trial court erroneously denied the Potawatomis' request for injunction. The trial court correctly held that the phrase "Indian Country" refers to the territory over which an Indian tribe exercises its sovereign powers; it is "those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied, U.S.*, 108 S. Ct. 2870 (1988). The test is whether the land has "been validly set apart for the use of the Indians as such, under the superintendence of the Government." *United States v. Pelican*, 232 U.S. 442, 449 (1914), quoted in *United States v. McGowan*, 302 U.S. 535, 539 (1938), *United States V. John*, 437 U.S. 634, 649 (1978), *cert. denied*, 441 U.S. 925 (1979). The tribal convenience store is located on land which, during all relevant periods of time, was held in trust by the federal government for the Potawatomis. Congress specifically authorized the Tribe to convey this land, located within the original Potawatomi reservation boundaries, to the United States in trust. *See* Act of January 2, 1975, Pub. L. No., 93-591, 88 Stat. 1922 (1975). "[L]ands held in trust by the United States for the Tribes are Indian Country within the meaning of §1151(a.)"

Cheyenne-Arapaho Tribe v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980). It has long been the law that land purchased in a state by the federal government and held in trust for Indians is "Indian Country." *See United States v. McGowan*, 302 U.S. 535, 538-39 (1938). As set forth by the Supreme Court, section 1151 was intended to designate as Indian Country all lands set aside by whatever means for a tribe under federal protection together with trust and restricted Indian allotments. *See United States v. John*, 437 U.S. 634, 648-49 (1978).

Oklahoma argues before us that (1) the convenience store land is not a "dependent Indian community," and (2) that the tribal convenience store is not located on an "Indian allotment." Neither the trial court nor the Tribe has ever asserted that the tribal convenience store was on an Indian allotment or a dependent Indian community.

Oklahoma contends, through a statistical analyses (based on Dawes Commission reports) that no "Indian Country" exists in Oklahoma. They argue that "the Tribe has not developed a living tribal community apart from the general community of the state and have in fact been assimilated into the general community of the state." This is irrelevant. The Tribe does not dispute that its members are citizens of Oklahoma or of other states and have been "assimilated" into society. This assimilation, however, does not justify the conclusion that the Tribe has no existence apart from the state or that the Tribe has been assimilated into the state. The Tribe exists apart from its individual members. Moreover, the fact that individual members of an Indian tribe have been "assimilated" or have become citizens does not change the status of the land held by the United States in trust for the Tribe. It does not transform the land from "Indian Country" to land totally subject to state jurisdiction. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), is not contrary. In *Mescalero*, the land at issue was "located outside the boundaries of the Tribe's reservation" and was not owned by the Mescaleros but rather was "leased from the United States Forest Service for a term of 30 years." *Mescalero*, 411 U.S. at 146. *Mescalero*, therefore, is distinguishable from the case at hand; and the Court's holding that the *Mescalero* land was not "Indian Country" has no application to this case.

Because the convenience store is located in Indian Country, the Potawatomis possess sovereign powers with respect to the land and the store. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978). In *Wheeler*, the Court recognized that: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *Id.* at 323. Thus, because the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress. *See Bryan v. Itasca County*, 426 U.S. 373, 376-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-76 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175-77 (1973); *United States v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986). Oklahoma cites no federal law granting such jurisdiction. Moreover, Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, did not assert jurisdiction under Public Law 280, and can point to no voluntary grant of jurisdiction by the Tribe. Oklahoma's lack of jurisdiction points out the critical distinction between this case and the cases on which Oklahoma relies. For example, Oklahoma relies on *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), for the proposition that Indian retailers are subject to state taxation—at least with respect to sales made to tribal nonmembers. In *Colville*, however, the Indian tribe had opted to come under state jurisdiction pursuant to Pub. L. No. 83-280, 67 Stat. 588 (1953) and *Wash. Rev. Code* §37.12.010 (1957). *See Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1348-49 (E.D. Wash. 1978), *rev'd*, 447 U.S. 134 (1980). Because no such jurisdiction exists in this case, Oklahoma's reliance on *Colville* is misplaced.

We conclude that the district court improperly denied the Potawatomis' request to enjoin Oklahoma from collecting state sales tax on the Potawatomis' sales of cigarettes. Accordingly, we remand to the district court for a reinstatement of a permanent injunction on behalf of the Potawatomis.

III. *Costs*

This is a federal action. Unless otherwise provided, costs shall be awarded as a matter of course. Fed. R. Civ. P. 54(d) provides:

> (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Contrary to Oklahoma's assertion, Oklahoma can be held liable for costs. *See, e.g., State ex rel. Grigsby v. Silvers*, 180 P.2d 657 (Okl. 1947).

REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis.

We also REMAND for consideration of the Potawatomis' motion for costs.

APPENDIX B

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No.CIV-87-0338-W
THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission, Defendants.	)	

JUDGMENT

On April 15, 1988, this Court, having reviewed the parties' Stipulation of Fact and having determined that it had jurisdiction to resolve the issues raised in the complaint of the plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma, and those issues raised in the counterclaim of the defendants, The Oklahoma Tax Commission, Cindy Rambo, Chairman, Robert L. Wadley, Vice-Chairman, and Don Kilpatrick, Secretary, which fell within the scope of waiver recognized in *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1984), entered Findings of Fact and Conclusions of Law. Pursuant to the same, it is hereby ORDERED and ADJUDGED

(1) that the plaintiff not only is exempt from payment of state sales taxes but also is immune from liability for the assessment issued by the defendants on March 5, 1987, for taxes due for sales of cigarettes from December 1, 1982, to September 30, 1986;

(2) that sales of cigarettes to members of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Gallery Trading Post are exempt from application of state

sales taxes;

(3) that sales of cigarettes to nonmembers of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Gallery Trading Post are subject to application of state sales taxes; and

(4) that the plaintiff must aid the defendants in collection of these taxes and comply with statutory reporting and recordkeeping requirements.

In accordance with the foregoing, it is further ORDERED and ADJUDGED

(1) that the defendants are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the plaintiff;

(2) that the defendants are likewise immediately and permanently enjoined from collecting any state sales taxes on purchases by members of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Galley Trading Post; and

(3) that the plaintiff's request for further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers of The Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store a/k/a The Galley Trading Post is DENIED.

It is ORDERED that the preliminary injunctive relief previously granted by this Court in this action

(1) as it pertains to the assessment against and/or collection from the plaintiff and its members is VACATED upon entry of this Judgment which grants immediate and permanent injunctive relief in this regard; and

(2) as it pertains to collection of state sales taxes on purchases by nonmembers of The Citizen Band Potawatomi Indian Tribe of Okla-

homa and the statutory reporting and recordkeeping requirements herein imposed on the plaintiff remains in force and effect pending the resolution of post-trial motions, if any.

It is further Ordered that each party bear its own costs.
Dated at Oklahoma City, Oklahoma, the _____ day of May, 1988.

S/_____
Lee R. West
United States District Judge
Entered in Judgment Docket on
May 6, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. CIV-87-0338-W
THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission, Defendants.	)	

ORDER

This matter comes before the Court on the plaintiff's request that the Court permanently enjoin the defendants from exercising or attempting to excise jurisdiction over the plaintiff through any tax assessment proceeding and from entering the plaintiff's land to assess and/or collect state sales taxes. The defendants have counterclaimed for declaratory and injunctive relief and have sought an order declaring that the defendants can enforce state tax laws against the plaintiff and an injunction enjoining the plaintiff from selling cigarettes without collecting and remitting state sales taxes. Based upon stipulated facts and the argument and authorities submitted by the parties, the Court makes its determination.

Indian County

1. The plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma (the Tribe or Citizen Band), is a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and is duly recognized as an Indian tribe

by the United States Secretary of the Interior (the Secretary).

2. The defendants are the Oklahoma Tax Commission and its appointed members acting in their official capacities.

3. The Potawatomi Indians originally resided around the Great Lakes in Indiana, Illinois, Wisconsin and Michigan.

4. The "Pottowautomie Nation" was removed by the Treaty of June 5 and 17, 1846, to a thirty-square-mile reservation in Kansas.

5. Pursuant to the Treaty of November 15, 1861 (as amended by the Treaty of March 29, 1866), the reservation was divided into individual allotments. When the sale of these allotments produced poverty, the Potawatomi Indians were divided into two bands—the Prairie Band, which remained in Kansas, and the Citizen Band, which was removed to Oklahoma.

6. The Treaty of February 27, 1867, provided for a thirty-square-mile tract in Oklahoma for the Citizen Band. This area was approved as a reservation on November 9, 1870, by the Secretary and it included most of Pottawatomie County, part of eastern Cleveland County, part of southeastern Oklahoma County and a few acres in southwestern Lincoln County.

7. On May 23, 1872, the Citizen Band agreed to have a portion of its reservation allotted to tribal members. The allotments began in 1875 and continued for fifteen years until the passage of the General Allotment Act of 1887 (The Dawes Act). In 1891, the Citizen Band reservation was divided into allotments; unallotted land either was considered "surplus" and sold to non-Indians or was retained by the federal government.

8. On September 13, 1960, the federal government after concluding certain of this retained land was also surplus, conveyed to the Citizen Band 57.99 acres in Pottawatomie County. The legislation authorizing this conveyance stated that the property would be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership.

9. On August 11, 1964, the federal government conveyed seven additional tracts, 255.196 acres, to the Citizen Band in Pottawatomie County. The legislation conveying these seven tracts as it pertained to tracts numbered six and seven likewise stated that these tracts were not exempt from taxation or restriction on use, management or disposition because of Indian ownership.

10. On September 16, 1971, the Citizen Band by resolution asked the federal government to accept all conveyed land in trust. This resolution expressly noted that the lands to be conveyed to the federal government were subject to no restrictions because of Indian ownership and requested that the lands should be redesignated restricted lands.

11. On February 18, 1974, the Mayor and the Board of Commissioners of the City of Shawnee passed a resolution wherein they endorsed the Tribe's request for trust status of the land.

12. On January 2, 1975, Congress authorized the Citizen Band to convey seven tracts, 279.956 (the 57.99 acres included in the 1960 conveyance and the first six tracts included in the 1964 conveyance) to the United States in trust for the benefit and use of the Tribe.

13. On May 27, 1976, this was accomplished.

14. The Tribe owns and operates a convenience store called the "Potawatomi Tribal Store a/k/a The Gallery Trading Post." The store was constructed by the Citizen Band with federal funds secured from a Community Development Block Grant program sponsored by the United States Department of Housing and Urban Development.

15. The land upon which this tribal store is located was included in the unallotted land that was retained by the federal government in 1891. It was held by the federal government until 1964 when it was included in the 255.196 acres conveyed to the Tribe. It was then returned to the federal government in trust for the benefit and use of the Tribe in 1976.

> "The touchstone for allocating authority among the various governments has been the concept of "Indian Country," a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian County, state jurisdiction has obtained."

Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987) (quoting *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625, 627 (Okla. 1983)). While the defendants have argued that the status of the land upon which the tribal store is located is immaterial, the Court has nevertheless determined to resolve this issue and in so doing has referred to the United States Supreme Court's decision in *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975).

In *DeCoteau*, the Supreme Court addressed the very legislative enactments which ratified the sum certain, cession agreements which pertain to this case and found that it was clear that the reservation had been diminished by conveyance of unallotted lands to the federal government and that these unallotted lands had been stripped of reservation status. *Id.* at 446. Such conclusion is however not dispositive of the issue in the instant case. Under the broad interpretation given to title 18, section 1151 of the United States Code, subsequent events have, in this Court's opinion, restored a portion of these original unallotted and conveyed lands to "reservation" status and thus to "Indian country" status. This portion includes the land upon which the tribal store is located.

Section 1151 defines "Indian country" in part as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government ...," 18 U.S.C. Section 1151(a), and although enacted for purposes of determining federal criminal jurisdiction, the statute is equally applicable in civil cases. *E.g., California v. Cabazon Band of Mission Indians*, 55 U.S.L.W. 4225, 4226 n.5 (February 25, 1987). As the United States Court of Appeals for the Tenth Circuit

noted in *Indian Country*, the term "Indian reservation" has been used in various ways and "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status." 829 F.2d at 973. The circuit court noted that

> "for purposes of defining Indian country, the term simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments."

The defendants have contended that the circumstances surrounding the reacquisition of the land by the Tribe and the eventual conveyance of the land in trust to the federal government for the benefit and use of the Tribe show no intent on the part of the Tribe or the federal government that the land be a "reservation." The Court finds the language contained in Senate Report No. 93-877 which accompanied the legislation conveying the land to the federal government in 1974 belies such argument. The Senate Report reads in part that

> "[t]he present fee ownership of the land presents a major problem to the band. The Economic Development Act provides that tribally owned lands which are held in trust may receive EDA designation, thereby enabling the tribes to qualify if otherwise eligible for loans and grants from the agency. If the United States were to accept the band's conveyance and hold these tracts in trust, the band could apply for EDA designation, which if conferred, would enable it to develop commercial and industrial sites. The end result of such development would be the alleviation of the band's and the area's unemployment problems."

There is no question that the original reservation was Indian country because it was validly set apart for use by the Tribe. While the Court is not persuaded by the Tribe's argument that the land was held "in trust" from 1891 to 1964 based upon the unequivocal language of the General Allotment of 1887, it is clear that the land is

now held in trust for the benefit and use of the Tribe. The protective attitude of the federal government which is embodied and reflected in case law interpretation of the definition of "Indian country" is supported by this intent to redesignate the status of the land so that the Tribe would qualify for federal assistance. Such acceptance of the land by the federal government and such redesignation at the insistence of Tribe indicate a renewed existence of federal superintendence.

TAXATION

The intrusion of state taxing power into Indian country is one of the most frequently litigated issues between Indian tribes and states, in part no doubt because of the serious financial importance this power has for both entities. Based upon extant authority and to the extent that this lawsuit involves *both* the issue of assessment and the issue of collection, the Court sets forth the following findings and conclusions.

1. The tribal store sells packages of cigarettes to all persons of legal age.

2. No records are kept which distinguish between sales to tribal members, other Indians and non-Indians.

3. Under Oklahoma law, the defendants enforce state taxing laws including a cigarette tax which requires those selling cigarettes in the state of Oklahoma to be licensed and to purchase and affix state tax stamps before selling cigarettes.

4. The Tribe has never purchased a license to sell cigarettes from the state of Oklahoma.

5. The tribe does not and has never collected state sales tax on packages of cigarettes.

6. The tribe does impose a tribal tax on the cigarettes sold and all packages of cigarettes sold bear a tribal tax stamp.

7. The Tribe's tobacco ordinance has been approved by the Department of Interior-Bureau of Indian Affairs.

8. The money generated by the sale of cigarettes goes into the tribal general fund for the use and benefit of the Tribe.

9. As of September 30, 1985, gross annual sales for the tribal store totalled $1,764,704.00 and the Tribe had gross annual operating revenues from all sources of $2,158,906.00.

10. On March 5, 1987, the Tribe received a proposed assessment in the amount of $2,671,470.70 for state cigarette taxes allegedly due for cigarette sales by the Tribe at the tribal store from December 1, 1982, to September 30, 1986.

11. The Oklahoma sales tax is expressly imposed on the ultimate consumer. 68 O.S. · ·1361. Thus, the legal incidence of such tax falls upon the purchaser. *E.g., Indian Country*, 829 F.2d at 984.

Oklahoma has disclaimed jurisdiction over Indian land. *See. Indian Country*, 829 F.2d at 976-81. The effect of this disclaimer of jurisdiction "'is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished.'" *Id.* at 980 (quoting S.Rep. No. 699, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 2409, 2412). Despite such disclaimer, the United States Supreme Court has ruled that even in the absence of express congressional consent, a state under certain circumstances"' may validly assert authority over the activities of nonmembers on a reservation, and ... in exceptional circumstances...may assert jurisdiction over the on-reservation activities of tribal members.'" *Cabozon Band*, 55 U.S.L.W. at 4228 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983)). While notions of Indian sovereignty have been adjusted in the area of state taxation to accommodate state interests in regulating the affairs of nontribal members (subject, as herein addressed, to two important limitations), a per se rule has nevertheless been adopted with regard to taxation of on-reservation activities of tribal members. 55 U.S.L.W. at 4228 n.17.

In this regard, the Tribe itself not only is exempt from payment of state sales tax (such exemption is recognized and acknowledged by the defendants in pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe. Likewise, the Court finds that purchasers of cigarettes at the tribal store who are Citizen Band members are exempt from payment of state sales tax. *E.G., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976).

As noted, the state's ability to exercise concurrent jurisdiction over nontribal members' on-reservation activities and power to levy taxes on on-reservation sales of nontribal purchasers is subject to two separate and equally vital restrictions. First,the exercise of state authority may be preempted by federal law and second, such authority may unlawfully infringe on the right of reservation Indians to make their own laws and be governed by them. Either barrier, standing alone, can be a sufficient basis for holding state law inapplicable to on-reservation activities. *E.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980).

Preemption demands "a particularized inquiry into the nature of the state, federal, and tribal interests at stake," *Indian Country*, 829 F.2d at 985 (quoting *Bracker*, 448 U.S. at 145), and "'[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interest at stake is insufficient to justify assertion of state authority.'" 829 F.2d at 985 (quoting *Mescalero Apache Tribe*, 462 U.S. at 334).

The state has a strong interest in increasing revenue and in preventing evasion of valid tax laws and this interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980). Tribal interests are likewise strongest "when the revenues are derived from value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services." *Id.* at 156-57.

In the instant case the value marketed by the tribal store to nontribal members is not generated on the reservation by activities in which the Tribe has a significant interest. *Id.* at 155. What the tribal store offers these purchasers is solely an exemption from state taxation. *Id.*; *e.g., Mescalero Apache Tribe*, 462 U.S. at 341 & n.26 (distinction between on reservation sales to nonmembers of goods not manufactured by Tribe or its members).

Furthermore the fact that the Tribe itself has imposed a cigarette tax does not demand preemption of a state law as to persons who would conduct business elsewhere. 447 U.S. at 155. The Court realizes that application of a state tax to sales by nontribal purchasers blunts the attractiveness of such sales and that an additional tribal tax creates a potential competitive disadvantage. However, in this instance it is the nontribal consumer who saves the tax and who reaps the benefit of any tax exemption, *Moe*, 425 U.S. at 481-82, and such situation does not require preemption of a nondiscriminatory state tax.

Likewise the fact that the federal government encourages self-sufficiency and economic development, has approved the Citizen Band's tobacco ordinance or has provided funds to construct the tribal store neither immunizes nontribal purchasers nor insulates sales by nontribal purchasers from application of the state tax.

The doctrine of infringement bears a close relation to the doctrine of preemption because interference with tribal self-government is interference with the federal policies that promote it and it too triggers a balancing of tribal, federal and state interests. *Colville*, 447 U.S. at 156. Recognizing that both the state and the Tribe have competing interests in volume sales of cigarettes, the Court must weigh the state's interest in applying its cigarette tax to on-reservation sales to nontribal members against the impact this nondiscriminatory tax has on the Tribe's ability to govern itself effectively. Because the Citizen Band is not developing or marketing a tribal resource but is only importing a product for immediate resale to *inter alia* nontribal members, the Court finds application of this tax does not impermissibly infringe on the Citizen Band's right to self-government. Reduction of tribal revenue does not invalidate a state tax. *E.g., id.* at 154-59.

Thus, the Court finds while the instant assessment against the Tribe for payment of cigarette sales tax unremitted from 1982 to 1986 is improper, prospective collection by the Tribe on on-reservation sales to nontribal members is permitted. The state's requirement that the Tribe collect a tax validly imposed on nontribal members is a "minimal burden" *Moe*, 425 U.S. at 483, which does not frustrate tribal self-government. *Id.* The Court finds further that the Tribe must affirmatively aid the state in its collection of this tax and comply with statutorily recordkeeping requirements. *Colville*, 447 U.S. at 159.

In this regard, the defendants have contended that the Tribe has an adequate state remedy to resolve the issues herein. Without deciding whether submission to the state's administrative proceedings would result in financial ruin to the Tribe and without resolving whether ability to pay excuses exhaustion of administrative avenues, the Court finds that these issues are properly before it for determination.

COUNTERCLAIM

Tribal sovereign immunity prohibits suit against Indian tribes without congressional authority. Thus, before this Court can acquire jurisdiction over the Citizen Band as to the defendants' counterclaim, it must appear affirmatively that "there has been a congressional or tribal waiver of immunity." *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982); *e.g.*, *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). It has also been recognized that when a sovereign sues"'it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the [sovereign's] suit, and to the extent of defeating the [sovereign's] claim but not to the extent of a judgment against the [sovereign] which is affirmative in the sense of involving relief different in kind or nature to that sought by the [sovereign] or in the sense of exceeding the amount of the [sovereign's] claims...."'*Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1961)). The Tenth Circuit has held that this doctrine

applies equally to Indian tribes. 687 F.2d 1344.

The Tribe did not waive its traditional immunity simply because it initiated this action. Thus, the Court must examine the allegations and the relief sought in the defendants' counterclaim in light of these limitations as to subject matter and issues reasonably incident to the primary action. In so doing, the Court finds that to the extent that both the Tribe and the defendants question jurisdiction of the state and its taxing power as to purchasers of cigarettes at the tribal store, the counterclaim is permissible.

CONCLUSION

Due to the number of issues and arguments advanced by the parties, the Court hereby DIRECTS the parties to confer within fifteen (15) days and to advise the Court thereafter if any issues remain to be resolved. If the parties agree that entry of final judgment is appropriate, they are to confer within this same period of time and to submit a final judgment immediately thereafter in accordance with the Court's findings and conclusions for the Court's approval and signature. This Court's Order which granted the Tribe's request for preliminary injunctive relief and which is now in force and effect will be vacated upon entry of final judgment.

It is so ORDERED this 15th day of April, 1988.

S/Lee R. West
LEE R. WEST
UNITED STATES DISTRICT COURT

APPENDIX D

Letter from Business Tax Division of the Oklahoma Tax Commission

March 4, 1987

To: Citizen Band Potawatomi Indian Tribe of Oklahoma
DBA: Gallery Trading Post
Route 5, Box 151
Shawnee, OK 74801

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Re: Proposed Assessment of Penalty and Interest in the Amount of $2,691,470.70 for Sale and Distribution of Unstamped Cigarettes

Gentlemen:

From an examination and audit of reports, it appears that during the period from December 1, 1982 to September 30, 1986, you sold and/or distributed for consumption 6,134,380 packs of twenty cigarettes each, and 18,780 packs of twenty-five cigarettes each, without stamps affixed thereto as required by law.

The amount of tax due upon the sale or distribution of said number of cigarettes is $1,108,413.90.

Pursuant to the provisions of 68 O.S. 1981, §305(c) the Oklahoma Tax Commission hereby proposes the assessment against you of $2,216,827.80, the sum being equal to twice the amount of the tax due, plus interest thereon to the date of this letter, in the amount of $363,801.51 and penalty in the amount of $110,841.30; for a total proposed assessment of $2,691,470.70.

If you would wish to protest this proposed assessment, you may file a verified written protest, in triplicate, with the Business Tax Division of the Oklahoma Tax Commission within thirty (30) days after the

date of mailing this letter, as provided in 68 O.S. 1981, §221. If you fail to file a written protest within the thirty day period, this assessment will, without further action by the Commission, become final and absolute at the expiration of thirty days from the date of mailing shown above. Such final assessment will accrue interest at the rate of eighteen percent (18%) per annum until paid, and further proceedings by way of tax warrant or court action may be had to enforce the state's lien.

Very truly yours,
OKLAHOMA TAX COMMISSION

s/Ray A. Freeman
Ray A. Freeman
Operation Support Section

APPENDIX E

TITLE 28 UNITED STATES CODE §1362

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

APPENDIX F

TITLE 28 UNITED STATES CODE §1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

No. 89-1322

In The

Supreme Court of the United States

October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL MINNIS*
DAVID MCCULLOUGH
MICHAEL MINNIS & ASSOCIATES, P.C.
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Attorneys for The Citizen Band Potawatomi Indian Tribe of Oklahoma

March 22, 1990

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the State of Oklahoma may assess an Indian tribe with a cigarette tax for cigarettes sold in Indian Country.

2. Whether an Indian tribe which files suit to enjoin an unlawful state tax assessment thereby waives suit immunity for a counterclaim seeking declarative and injunctive relief.

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COUNTER-STATEMENT OF THE CASE

The Oklahoma Tax Commission ("Oklahoma") is the petitioner.[1] The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") is the respondent.

The Potawatomis are a federally-recognized Indian tribe[2] that adopted a Constitution under the Oklahoma Indian Welfare Act. *See 25 U.S.C. §503; 50 Fed. Reg. 6055 (1985).* Consistent with Congressional intent,[3] the Potawatomis engage in various enterprises in an attempt to become self-sufficient. One of these enterprises is a convenience store known as the "Potawatomi Tribal Store" (also known as "Gallery Trading Post") which the Potawatomis wholly own and operate. The tribal store was constructed with federal funds and is located on lands within the Potawatomis' original reservation[4] boundaries which are held in trust by the United States government and are "exempt from state and local taxation". *25 U.S.C. §465; see also 25 U.S.C. §503.* Under treaty rights, the Potawatomis were promised that their lands "shall never be included within the jurisdiction of any state". *Art. 3,*

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[1] In the proceedings below, the parties included the Oklahoma Tax Commission and individual members of the Tax Commission.

[2] "The State of Oklahoma acknowledges federal recognition of Indian tribes recognized by the Department of the Interior." OKLA. STAT. tit. 74, §1221 (1989 Supp.).

[3] See e.g. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973); 25 U.S.C. §450 et seq. and §1451 et seq.

[4] Oklahoma's references to "off-reservation" activity [see e.g. Petition, supra pp. 8-9] are irrelevant. All cigarette sales here were clearly within Indian Country.

"February 27, 1867 Treaty", 15 Stat. 531 (1868). These promises are reflected in Oklahoma's Organic and Enabling Acts and Constitution. As noted in *Martinez v. Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915, 917 (10th Cir. 1957), Oklahoma specifically recognized the exclusivity of federal jurisdiction over Indian lands in its Constitution. *See "Oklahoma Organic Act", Act of May 2, 1890, ch. 182, §§1-44, 26 Stat. 81-100* ("[N]othing in this act contained shall be so construed as to give jurisdiction to the courts established in said territory." *Id.* at §12); *"Oklahoma Enabling Act", Act of June 16, 1906, ch. 33-35, §§1-22, 34 Stat. 267-78* ("[N]othing contained in the said Constitution [of Oklahoma] shall be construed to limit or impair the right of persons or property pertaining to the Indians of said territory." *Id.* at §1). The Enabling Act prohibition was recognized in the Constitution subsequently adopted by Oklahoma. *See OKLA. CONST., art. I, §3 (1981).* "Article I, §3 of the Oklahoma Constitution constitutes a legal impediment" to the exercise of state court jurisdiction in Indian Country. *State v. Little Chief,* 573 P.2d 263, 265 (Okl. Cr. 1978); *see also C.M.G. v. State,* 594 P.2d 798, 799 (Okl. 1979).

The Potawatomis have enacted a cigarette tax ordinance which has been approved by the federal government and been published in the Federal Register. *47 Fed. Reg. 10,643, §§1-10 (1982). See* Appendix A-7 to A-24. Since on or about August of 1982, the Potawatomis have sold cigarettes at the tribal store. Before being sold, the cigarettes are affixed with the Potawatomis' own tax stamp. The proceeds of the Potawatomi cigarette tax and the profits generated by the tribal store finance tribal operations.

The Potawatomis have never purchased, nor has Oklahoma ever attempted to require the Potawatomis to purchase, a state license to sell cigarettes. Oklahoma never attempted to license or assess the Potawatomis with any tax prior to February 12, 1987, and specifically recognized that sales to tribes were exempt from sales taxes under a governmental exemption (Appendix E-1).[5]

When Oklahoma served the Potawatomi Tribal Chairman with a $2.7 million proposed cigarette tax assessment (*see* Appendix A-25), the Potawatomis promptly filed a complaint in the United States District Court for the Western District of Oklahoma seeking to enjoin this assessment. The Potawatomis submitted to the district court's jurisdiction "for the sole and limited purpose of securing equitable relief". *See* Appendix A-2, ¶1. The Potawatomis also filed a motion for preliminary injunction pending the trial court's ruling on the merits.

In a response filed the day of the hearing on the Potawatomis' motion for temporary injunction, Oklahoma represented that it intended to revoke the assessment against the Potawatomi's Chairman and to re-issue the same assessment against the Tribe. Based on that representation, the Potawatomis were substituted as the subject of the assessment. After the hearing, the Potawatomis' motion was granted and Oklahoma was temporarily enjoined from pursuing the proposed cigarette tax assessment against the Potawatomis.

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[5] Thus, Oklahoma is engaging in hyperbole in arguing that the Tenth Circuit opinion has resulted in "restructuring Oklahoma's taxing system by decree". Petition, supra p. 14.

Thereafter, Oklahoma answered and counterclaimed seeking declaratory relief and damages. *See* Appendix B-1. In its counterclaim, Oklahoma asked the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma has jurisdiction to tax Potawatomi sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted. *See* Appendix B-6. The Potawatomis' motion to dismiss this counterclaim was denied. *See* Appendix C-1.

The matter was submitted to the Court upon stipulated facts and briefs. Thereafter, the district court granted the Potawatomis' prayer for a permanent injunction[6] and prohibited Oklahoma from assessing the Potawatomis with a state sales tax; however, the district court also granted, in part, Oklahoma's counterclaim. *See Petition, supra p. Appendix A-9.* Both parties appealed to the Tenth Circuit.

The Tenth Circuit found that the District Court erred in denying the Potawatomis' motion to dismiss Oklahoma's counterclaim and reversed and remanded the case

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[6] Oklahoma was "permanently enjoined from collecting any state sales taxes against and/or collecting any state sales taxes from" the Potawatomis. See Petition, supra Appendix A-10. Thus, Oklahoma overstated when – in its statement of the case – it represented that the District Court "imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or **enforcing any tax law** against the Tribe . . . " Petition, supra p. 5 (emphasis added).

with instructions to dismiss the counterclaim. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303, 14 Fed. R. Serv. 3d 1491 (10th Cir. 1989).

Thereafter, the Potawatomis moved the District Court to enter an injunction consistent with the mandate. Oklahoma did not oppose this motion and a permanent injunction was entered. *See* Appendix D-1.

Oklahoma has now brought this petition for certiorari.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari is granted "only when there are special and important reasons therefor". *Sup. Ct. R. 17.1. See also Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Because Oklahoma has not articulated any "special and important reason" for granting certiorari, the petition should be denied.

This suit is simple and straightforward. Oklahoma attempted to assess an Indian tribe for $2.7 million in cigarette taxes. Contending that this proposed assessment was unlawful, the Indian tribe brought suit for injunctive relief. Oklahoma has yet to cite to the District Court, the Tenth Circuit or this Court a single authority for the proposition that it can assess an Indian tribe with a tax, nor has Oklahoma ever offered any support for its position that it has jurisdictional authority to proceed in

federal court against an Indian tribe with a counterclaim for a declaratory judgment.

In moving against the Potawatomis, Oklahoma served a proposed $2.7 million assessment on John Barrett, Jr. – who was then and is now the Potawatomi Business Committee Chairman. The proposed assessment was for allegedly selling cigarettes at the tribal store in December of 1982 through December of 1986 without remitting state cigarette taxes. As Oklahoma well knew, Barrett's only connection with the tribal store during this period was as the Potawatomis' Business Committee Chairman or as Tribal Administrator or as an enrolled member of the Tribe. Under state law, Barrett had 30 days to file a protest of Oklahoma's proposed assessment. *OKLA. STAT. tit. 68, §221(c) (1981).* Absent the filing of a timely protest, he would have been personally liable for $2.7 million in state cigarette taxes.

On appeal and now in the petition for certiorari, Oklahoma is not asserting any authority for the proposition that a state can assess taxes against Indian tribes. Instead, Oklahoma impugns the motives of the justices who wrote the opinion below [*Petition, supra p. 5*] and whines about the difficulties state governments encounter when Indian tribes exercise their rights. *Id.* at 18.

Oklahoma has cited no authority nor even attempted to argue that it could have independently pursued its action in federal court. Rather, Oklahoma is attempting to use its patently unlawful act in attempting to assess a tax against an Indian tribe as a way of acquiring jurisdiction to litigate Indian tribes out of existence.

Oklahoma has not articulated any conflict between the circuit courts of appeal concerning the issue of tribal sovereign suit immunity. It merely asks this Court to overturn 200 years of unbroken recognition of the right.

The purported decisional conflicts posited by Oklahoma are not germane. The Oklahoma Supreme Court opinion referenced by Oklahoma has been mooted by a decision of the U.S. District Court for the Northern District of Oklahoma. The Oklahoma Supreme Court case is not controlling in this litigation. In fact, it was not cited heretofore by Oklahoma in the Tenth Circuit and is not in any meaningful conflict with the decision in this case.

The U.S. Supreme Court case cited by Oklahoma[7] was not a tax assessment case and arose in a state which had been specifically granted authority in Indian Country by Public Law 280.[8] In any event, *Colville* has no relevance unless Oklahoma can pursue its counterclaim for a declaratory judgment. This pursuit is only possible if all case law concerning counterclaims against sovereigns is reversed. Oklahoma has not articulated any valid reason for such a reversal. In fact, clearly illegal behavior by the State would be condoned if Oklahoma is allowed to pursue its counterclaim. Oklahoma either can assess a tribe

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[7] Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

[8] At page 9 of the Petition, Oklahoma argues "this Court never relied on P.L. 280 for its holding in Colville, nor even mentioned the law". On the contrary, Public Law 280 was cited by the State as authority for state jurisdiction in Indian Country. Colville, supra p. 142, n. 8. See also id. at 164, n. 32 ("The Colville Tribe consented in 1965 to the State's assumption of jurisdiction over it . . . ").

and collect the tax or it cannot. If it can assess an Indian tribe, then Oklahoma does not need help from the federal court and the Potawatomis are not entitled to an injunction. On the other hand, if, as the district and appellate courts found, Oklahoma has no business assessing an Indian tribe with a cigarette tax, then Oklahoma cannot use a clearly illegal act to acquire jurisdiction for the purpose of litigating other issues. This would condone and reward illegal and improper state action. It would allow the bootstrapping of jurisdiction. States would be encouraged to bring all kinds of unlawful actions against Indian tribes solely for the purpose of getting sued so they could then pursue their own claims.

PROPOSITION I: THE TENTH CIRCUIT OPINION THAT OKLAHOMA MAY NOT ASSESS AN INDIAN TRIBE WITH A CIGARETTE TAX IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

In its first proposition, Oklahoma argues that the Tenth Circuit opinion was an "express rejection of the controlling authority of this Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980)" [*Petition, supra p. 6*] and in conflict "with the Supreme Court of Oklahoma's opinion in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985)" [*Petition, supra p. 11*] (hereafter *Seneca-Cayuga I*). Oklahoma is erecting irrelevant strawmen. **First**, *Colville* was merely cited by the Tenth Circuit in dicta – it was not dispositive in reversing the district court. **Second**, *Seneca-Cayuga I* was rejected by the United States Court of Appeals for the Tenth Circuit. *See Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma, ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (hereafter *Seneca-Cayuga II*).

a. *Washington v. Confederated Tribes of Colville.*

In relying on the *Colville* case, Oklahoma has placed the cart before the horse. Here, Oklahoma is attempting to directly assess the Potawatomis with $2.7 million in taxes.[9] *Colville* is not authority for the proposition that states can assess Indian tribes with a tax. In fact, *Colville* and related cases[10] were decided adversely to the tribes **only** because the "legal incidence of the tax" did not fall on the Tribe. *Colville, supra p. 142, n. 9.* State taxation of Indian tribes[11] for activities in Indian Country has consistently been rejected. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17, 107 S.Ct. 1083, n. 17 (1987); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373,

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[9] It is often said that the power to tax is the power to destroy. Unlike the tax collection cases, here the threat of destruction from an asserted taxing power is not hypothetical, but rather immediate. The Potawatomis would be destroyed as a tribe if forced to pay Oklahoma $2.7 million.

[10] California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 12, 106 S.Ct. 289, 290 (1985) (injunction against collecting state tax reversed because legal incidence of tax "falls on the non-Indian consumers of cigarettes"); Moe, infra p. 483 (1976) ("Since this burden [collecting state sales taxes] is not, strictly speaking, a tax at all . . . ").

[11] Indian tribes are not taxable entities under the Internal Revenue Code. Rev. Rul. 67-284, 1967-2, C.B. 55, 58; Memo. Sol. Int., May 1, 1941, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1044 (Washington: Government Printing Office, n.d.).

376-77, 96 S.Ct. 2102, 2105-06 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-82, 96 S.Ct. 1634, 1644-46 (1976); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-81, 93 S.Ct. 1257, 1266-67 (1973); *Mescalero Apache Tribe v. Jones*, supra p. 148.

Because *Colville* is not authority for state taxation of Indian tribes, its relevance arises only if Oklahoma can pursue a counterclaim which, as argued hereinafter, would violate the doctrine of sovereign suit immunity. The Tenth Circuit held that Oklahoma could not pursue its counterclaim against the Potawatomis and ordered the counterclaim dismissed. Thus, the only subsequent issue addressed by the Tenth Circuit was whether Oklahoma had authority to assess the Potawatomis with a $2.7 million tax. The Tenth Circuit found Oklahoma had no such authority and that Oklahoma's reliance on *Colville* was misplaced. *Id.* at 1306-7.

In any event, for the reasons expressed by the Tenth Circuit, the *Colville* case is distinguishable and not applicable to the action herein. *See Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d at 1307. Oklahoma failed to establish an independent jurisdictional grant of authority over Indian tribes which was present in *Colville*. Therefore, contrary to Oklahoma's argument, the Tenth Circuit did not expressly "reject" *Colville*, but rather distinguished it in dicta. *Id.* at 1307.

b. *State ex rel. May v. Seneca-Cayuga Tribe.*

In citing the *Seneca-Cayuga I* opinion, Oklahoma failed to notify the Court that this opinion was essentially

nullified when the U.S. District Court for the Northern District of Oklahoma[12] enjoined a state trial court from proceeding consistent with *Seneca-Cayuga I*. The federal injunction was affirmed on appeal. *Seneca-Cayuga II, supra p. 717*. No conflict exists between the Oklahoma Supreme Court's *Seneca-Cayuga I* opinion and the Tenth Circuit opinion here. The state/federal conflict, if any, is between *Seneca-Cayuga I* and *Seneca-Cayuga II*. Resolution of this alleged conflict should be pursued through a petition for certiorari from *Seneca-Cayuga II*, not by review of this case. Although the Potawatomis mentioned *Seneca-Cayuga I* in their Tenth Circuit brief,[13] Oklahoma did not cite *Seneca-Cayuga I* or argue about an alleged conflict until filing its petition for certiorari. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (on review by certiorari, Supreme Court "will not consider" issue which is "neither pleaded, argued nor briefed either in the District Court or in the Court of Appeals").

Oklahoma has failed to present a conflict in the lower courts which would merit review by this Court.

PROPOSITION II: THE DECISION BELOW APPLIED THE DOCTRINE OF SOVEREIGN IMMUNITY CONSISTENT WITH ALL PAST CASES.

It has long been recognized that Indian tribes enjoy sovereign immunity from unconsented suit, subject to

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[12] Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, 13 Indian L. Rptr. 3103, Nos. 85-C-639-B and 86-C-393-B (N.D. Okl. June 5, 1986). As a party to this suit, Oklahoma, of course, is well aware of it.

[13] See Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, No. 88-2160 (10th Cir. 1989), Brief of Appellant, pp. 25, 28 (Aug. 31, 1988).

plenary control of Congress. *See U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 173 (1977). The standard articulated by the Supreme Court for finding a Congressional waiver of tribal sovereign immunity is that there be an "unequivocal expression of . . . legislative intent". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). An Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff. *U.S. Fidelity & Guaranty Co., supra p. 513.* "[T]ribal [suit] immunity . . . is generally coextensive with that of the United States." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *cf. Fed. R. Civ. P. 13(d).*

> Although a counterclaim may be asserted against a sovereign by way of set-off or recoupment to defeat or diminish the sovereign's recovery, **no affirmative relief** may be given against a sovereign in the absence of consent.

U.S. v. Agnew, 423 F.2d 513, 514 (9th Cir. 1970) (emphasis added). *See also Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339, 1351 (E.D. Wash. 1978) ("Since the Tribes have not consented to suit, this Court has no jurisdiction to entertain the State's claim for declaratory relief"), *reversed on other grounds*, 447 U.S. 134 (1980). The Potawatomis did not consent to the jurisdiction necessary to litigate Oklahoma's counterclaim, and the Tenth Circuit was correct in reversing the district court and remanding with instructions to dismiss the counterclaim.

Oklahoma argues that the sovereign suit immunity doctrine makes it very difficult for Oklahoma to collect taxes from another sovereign. *Petition, supra p. 18.* This is

not a new or novel situation but one which has always attended the sovereign suit immunity doctrine. *Cf. Santa Clara Pueblo, supra p. 70.* Oklahoma concludes that the "result being that even though the State does have the right to have its **valid** taxes collected, the State cannot enforce its right against the Tribe under the Tenth Circuit sovereign immunity theory." *Petition, supra p. 12* (emphasis added). Again, Oklahoma is making assumptions for which it has yet to provide any authority, to-wit: that its tax assessment against an Indian tribe is valid.[14]

Oklahoma argues that "this Court has abrogated the doctrine of sovereign immunity for Indian tribes in the area of state taxation in order to accommodate the legitimate and compelling interest of the state to collect its valid taxes." *Petition, supra p. 5.* This bold statement is not immediately followed with any citation of authority.[15]

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[14] Oklahoma continually misstates the Tenth Circuit decision upholding the Tribe's suit immunity and tax immunity. For example, Oklahoma argues, "The Tenth Circuit's opinion recognizes that **the Tribe maintains unqualified sovereignty over the State** which is co-extensive with that of the United States." Petition, supra p. 12. Similar arguments are made throughout the petition. See e.g. Id. at 16 ("These decisions do not provide that an Indian Tribe enjoys absolute and unqualified sovereignty over the government of the State of Oklahoma."). These arguments are non-sequiturs. The Potawatomis are not asserting any sovereignty over Oklahoma, but merely protecting their own.

[15] The lack of citation to authority is not surprising. This Court has historically recognized that only Congress – and not this Court – may abrogate tribal sovereign immunity. See e.g. Santa Clara Pueblo, supra p. 59.

The later citations on page 17 of the petition are not tribal suit immunity cases. They are suits involving individual Indians[16] or cases where Indian tribes were involved in activities outside Indian Country where the issue of suit immunity was not litigated[17] or cases where Indian tribes in P.L. 280 states were required prospectively to *collect* state taxes.[18] The *Moe* and *Colville* cases did not authorize a state to assess taxes against an Indian tribe.

Oklahoma argues that there "is no authority to allow a Tribe to operate a business **within this state** and without complying with state law". *Petition, supra p. 17* (emphasis added). The business being operated by the Potawatomis is not "within this state". The Potawatomis are conducting business on land within their original reservation boundaries held in trust by the United States

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[16] Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943) (portion of Indian probate estate – fee land, cash and securities – not exempt from state estate tax but transfer of restricted Indian lands are not subject to tax); Ward v. Race Horse, 163 U.S. 504 (1896) (off-reservation hunting and fishing by Indian); Rice v. Rehner, 463 U.S. 713 (1983) (person licensed under the Federal Traders License Act); McClanahan, supra (federal injunction of state taxation of Indian's reservation income and property upheld).

[17] Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (off-reservation fishing); Mescalero, supra p. 146 (state taxation of ski resort outside of reservation boundaries upheld where tribe "duly protested the use tax assessment and sought a refund of the sales taxes paid"). "[S]overeign immunity from suit was not an issue in Mescalero; the Tribe had paid the gross receipts tax under protest and was seeking a refund." Chemehuevi Indian Tribe v. California State Board of Equalization, 492 F.Supp. 55, 60 (N.D. Cal. 1979).

[18] Moe, supra; Colville, supra.

for the benefit of the Potawatomis, *i.e.* activity wholly within Indian Country. *See Mattz v. Arnett*, 412 U.S. 481, 506 (1973).

Oklahoma also argues that the Tenth Circuit opinion "has decided an important question of federal law in such a way that adversely affects the State's ability to tax **its citizens**". *Petition, supra* p. 18 (emphasis added). Again, Oklahoma provides no citation for the proposition that an **Indian tribe** is a citizen of a state. The extant case law is to the contrary.

> '[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.' *Rice v. Olson*, 324 U.S. 786.

McClanahan, supra p. 168. Two consistent themes characterize Indian law. The first is that the federal government has plenary control over Indian tribes [*Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977)]; that is, Congress tomorrow could forever and finally terminate the sovereign status of Indian tribes. The second, a corollary to the first, is that absent an exercise of this plenary power, the Indian tribes retain all of their sovereign rights to the absolute exclusion of the state. *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978); *U.S. v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986).

> [T]he jurisdictional presumption that exists in federal Indian law [is] that a state has no jurisdiction over Indians on a reservation unless it has been explicitly granted that jurisdiction.

People of South Naknek v. Bristol Bay Borough, 466 F.Supp. 870, 876 (D. Alaska 1979). This policy includes that the "scope of a state tax law may not encompass taxation of Indians or tribes". *F. Cohen, Handbook of Federal Indian Law*, p. 405 (1982 ed.). Among the reasons for this policy

is that Indian tribes are immune from suit and, absent federal statute, states have no jurisdiction in Indian Country. *U.S. v. John*, 437 U.S. 634 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976).

Oklahoma argues that if "the State cannot sue the Tribe for taxes, it would follow that the Tribe would not be responsible to the State for workers compensation or unemployment compensation." *See Petition, supra* p. 18. As Oklahoma well knows, this purported future disastrous result has long been the reality in Oklahoma. For example, Oklahoma was recently sanctioned for bringing a frivolous suit in an effort to compel an Indian tribe to participate in the state unemployment fund. *See State of Oklahoma v. The Choctaw Nation of Oklahoma*, No. CIV-88-595A (W.D. Okl. Jan. 4, 1989) (order granting sanctions). A copy is at Appendix F-1. Indian tribes are not subject to Oklahoma's workers compensation law. *See 82 Op. of Atty. Gen. of Okla., No. 22 (1982).* A copy is at Appendix G-1. *See also White Mountain Apache Tribe v. Industrial Commission of Arizona*, 696 P.2d 223 (Ariz. 1985).

Oklahoma says the Potawatomis may not be liable for damages incurred in tribal businesses or other businesses with which the Potawatomis deal. This is the very nature of sovereign immunity. For example, Oklahoma is immune from tort actions unless it waives immunity. *See e.g. OKLA. STAT. tit. 51, §152.1 (1989 Supp.)* ("The State of Oklahoma hereby adopts the doctrine of sovereign immunity.").

The decision of the Tenth Circuit Court of Appeals that the doctrine of sovereign suit immunity bars a counterclaim which has no independent jurisdictional basis is

consistent with extant law. Oklahoma has cited no compelling reason for changing these laws.

CONCLUSION

The petition for writ of certiorari does not present any special or important reason for this Court to review the opinion of the Tenth Circuit and, accordingly, should be denied.

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March 22, 1990

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INDEX TO APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Plaintiff,

v.

THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, CHAIRMAN OF THE TAX COMMISSION; ROBERT L. WADLEY, VICE-CHAIRMAN OF THE TAX COMMISSION; AND DON KILPATRICK, SECRETARY OF THE TAX COMMISSION,

Defendants.

CIV-87-0338 W

No. ___

COMPLAINT
(ACTION FOR INJUNCTIVE RELIEF)
(Filed Feb. 18, 1987)

Consistent with federal, constitutional and statutory law, plaintiff, an Indian tribe, brings this action to enjoin defendants from unlawfully interfering with plaintiff's right to make its own laws and be ruled by them in Indian Country.

I.

Jurisdiction and Venue

1. This is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior wherein the matter in controversy arises under federal law. Thus, this Court has original jurisdiction under the provisions of 28 U.S.C. §1362. Plaintiff's cause of action arises under the Constitution and laws of the United States, including: "Oklahoma Organic Act", (Act of May 2, 1890, ch. 182, §§1-44, 26 Stat. 81-100); "Oklahoma Enabling Act" (Act of June 16, 1906, ch. 3335, §§1-22, 34 Stat. 267-278); 25 U.S.C. §§501 *et seq.*; U.S. CONST. art. I, §8, cl. 3; art. IV, §3 cl. 2; art. VI, cl. 2; and amend. XIV, §1. Plaintiff submits to this Court's jurisdiction for the limited and sole purpose of securing the equitable relief prayed for herein.

2. Venue properly lies in this district under 28 U.S.C. §1391 as the acts of defendants of which plaintiff complains occurred wholly within this district and defendants reside within this district and within the State of Oklahoma. Plaintiff is situated within this district.

PARTIES

3. Plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma, is, and at all times hereinafter mentioned was, a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and duly recognized as an Indian tribe by the Secretary of the Interior. *See e.g.* 50 Fed. Reg. 6055 (1985). Plaintiff's tribal headquarters is located in Indian Country within Pottawatomie County, State of Oklahoma.

4. Defendants are the Oklahoma Tax Commission and its three appointed members. Defendant Oklahoma Tax Commission is located in Oklahoma County, State of Oklahoma, and the acts of its officers, agents, employees or others acting in concert have and will take place within the Western District of the State of Oklahoma.

GENERAL ALLEGATIONS

5. Consistent with federal law, the State of Oklahoma entered the union disclaiming any jurisdiction over Indian lands.

6. Pursuant to 25 U.S.C. §503, plaintiff adopted a Constitution establishing a tribal government which was approved by the Secretary of the Interior on October 17, 1938, and ratified by the tribal members on December 12, 1938. This Constitution, as amended, provides that plaintiff is a sovereign to be governed by a Business Committee periodically elected by tribal members.

7. Under the plaintiff's Constitution, the Business Committee is a five-member body with the "power to transact business and otherwise speak or act on behalf of the tribe in all matters on which the tribe is empowered to act now or in the future". John Barrett, Jr. was elected to a two-year term as Chairman of the plaintiff's business committee on June 29, 1985.

8. Plaintiff owns and operates a convenience store called Potawatomi Tribal Store (a/k/a "The Gallery Trading Post") wholly located on tribal trust lands and constructed by the tribe with federal funds secured through a federal community action block grant program.

9. Under Oklahoma law, defendants enforce state taxing laws including the state cigarette tax which requires those individuals selling cigarettes in the State of Oklahoma, to be licensed and to purchase and affix state tax stamps before selling the cigarettes.

10. Plaintiff has never purchased, nor has the State of Oklahoma ever attempted to require plaintiff to purchase, a license to sell cigarettes.

11. Defendants have never assessed and plaintiff has never collected a state tax on the sale of cigarettes on tribal land.

12. Plaintiff licenses the sale and imposes a tribal tax on cigarettes sold on tribal trust land. All cigarettes sold by plaintiff are in packages bearing the tribal tax stamp.

13. Plaintiff's cigarette tax ordinances have been approved by the federal government. A true and correct copy of plaintiff's ordinance imposing the licensing and taxes on cigarette sales is attached hereto as Exhibit "A".

14. The proceeds of the tribal tax are placed in the tribal general fund and represent 5% to 10% of the monies which finance plaintiff's operations.

15. The profits from the sale of cigarettes on tribal land flow through plaintiff's general fund and are used to help plaintiff become a self-sufficient sovereign consistent with the intent of Congress.

16. On or about February 3, 1987, defendants notified John Barrett "d/b/a Gallery Trading Post" that he had been assessed $2,691,470.70 for failing to remit the cigarette taxes allegedly due upon the sale of cigarettes

from plaintiff's store from December 1, 1982, through September 30, 1986. A true and correct copy of this assessment letter is Exhibit "B" hereto.

17. Under Oklahoma Statutes, Barrett has thirty (30) days or until March 4, 1987, to file written notice of protest of this purported tax assessment.

18. Defendants assert Barrett owes the taxes for the sale of cigarettes because he is doing business as the "Gallery Trading Post".

19. Other than being Chairman of plaintiff's Business Committee since June of 1985, Barrett has never had any connection with "The Gallery Trading Post".

20. Defendants know that Barrett does not do business as "The Gallery Trading Post" and are merely proceeding against plaintiff's officer to harrass plaintiff. Defendants' actions are a violation of Barrett's civil rights and are a direct affront to the sovereignty of plaintiff in violation of federal law.

21. As a federally-recognized sovereignty, plaintiff has the right to conduct business on its own land free from state interference and free to make its own laws and be ruled by them.

22. Plaintiff is immune from state taxation as are its officers and employees acting within the scope of their authority.

23. Defendants' efforts to assess taxes against plaintiff's officers or employees arising from sales made at plaintiff's store unlawfully interfere with plaintiff's right as an Indian tribe to govern activities which take place on its land.

24. Defendants' assessment of taxes under Oklahoma law against plaintiff's officer is an unlawful attempt to evade plaintiff's immunity from state taxation. Defendants' method of assessing plaintiff's officers and employees with the tax is a direct infringement upon plaintiff's right of self-government.

25. Contrary to the law and facts, defendants are attempting to assess a cigarette tax for sales at the plaintiff's tribal store against an individual, not plaintiff, as evidenced by the assessment letter to "John A. Barrett, d/b/a Gallery Trading Post". Defendants are attempting to do indirectly (assess plaintiff's officer) something it cannot do directly (assess plaintiff).

26. Unless defendants are enjoined from coming on plaintiff's land and from assessing plaintiff or its officers and employees, plaintiff will sustain substantial and irreparable injury to its right to self-government, including, *inter alia*, to the plaintiff's ability to get qualified people to serve as its officers and employees.

27. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this Court enter a judgment that:

1. Preliminarily enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees;

2. Permanently enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees;

3. Assesses defendants with plaintiff's costs herein including reasonable attorneys fees; and

4. Provides such further necessary and proper relief as may be just.

DATED: February 18, 1987.

PIERSON, BALL & DOWD

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ATTORNEYS FOR PLAINTIFF

EXHIBIT A

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Citizen Band of Potawatomi Indians of Oklahoma; Ordinance Regulating the Sale and Use of Liquor and Tobacco Products

February 19, 1982

This Notice is published in accordance with authority delegated by the Secretary of the Interior to the Assistant Secretary – Indian Affairs by 209 DM 8 and in accordance with the Act of August 15, 1953 67 Stat. 586 18 U.S.C. 1161 (1976). I certify that the following Resolution and Ordinance relating to the application of the Federal Indian tobacco and liquor laws on the tribal trust lands of the Citizen Band of Potawatomi Indians of Oklahoma were adopted on February 2, 1981, by the Citizen Band of Potawatomi Indians of Oklahoma Business Committee which has jurisdiction over the area of Indian country defined in the Ordinance reading as follows:

Kenneth Smith,

Assistant Secretary – Indian Affairs

Citizen Band Potawatomi Indians of Oklahoma

Shawnee Oklahoma

February 2, 1981

Resolution 81-19

A Resolution establishing the Citizen Band of Potawatomi Indians of Oklahoma ordinance regulating the distribution and sale of tobacco products and/or liquor and beer products.

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee as the governing body of the Citizen Band Potawatomi Indians of Oklahoma is charged by the Tribal Constitution and By-laws to transact business and other wise speak or act on behalf of the

Tribe in all matters on which the Tribe is empowered to act; and

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee has the responsibility of protecting the health, security, and general welfare of the Tribe and its members; and

Whereas, the State of Oklahoma is without jurisdiction on (t)ribal trust lands of the Citizen Band Potawatomi Indians of Oklahoma to regulate and control Indian smoke shops, liquor outlets, or other outlets operated by the Tribe or by tribal members; and

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee deems it essential to the health, security, and general welfare of the Citizen Band Potawatomi Indians of Oklahoma and its members to enact a comprehensive tobacco and liquor ordinance relating to the sale and distribution of cigarettes, other tobacco products and liquor products and levying an excise tax upon such sale and distribution on the Tribal Trust Lands of the Citizen Band Potawatomi Indians of Oklahoma: NOW.

Therefore, be it resolved: The Citizen Band Potawatomi Indians of Oklahoma does hereby promulgate the attached ordinance entitled "The Citizen Band Potawatomi Indians of Oklahoma Tobacco and Liquor Regulations."

Certification

We, Wanita R. Clifford, Tribal Chairperson and Christine Gifford, Secretary-Treasurer, of the Citizen Band

Potawatomi Indians of Oklahoma do hereby certify that the above resolution POTT = 81-19 is a true and exact copy as approved by the Business Committee, with 3 voting for, 0 opposed 1 abstention.

Wanita R. Clifford.

Acting Tribal Chairperson.

Mary Lynn Hilimeyer.

Acting Tribal Chairperson, Secretary, Treasurer.

The Citizen Band Potawatomi Indians of Oklahoma

Tobacco and Liquor Regulations

1-1 *Title and Purpose.*

1-1.01 This document shall be known as the Citizen Band Potawatomi Indians of Oklahoma Tobacco and Liquor Regulations. These regulations are enacted to regulate the sale and distribution of tobacco products and/or liquor and beer products on Tribal Trust Lands of the Citizen Band Potawatomi Indians of Oklahoma, and to generate revenue to fund needed tribal programs and services.

1-2 Definitions.

1-2.01 Unless otherwise required by the context the following words and phrases shall have the designated meanings:

(1) "Tribe" shall mean the Citizen Band Potawatomi Indians of Oklahoma. Route 5, Box 151, Shawnee, OK 74801.

(2) "Business Committee" shall mean the Citizen Band Potawatomi Indians of Oklahoma Business Committee as constituted by Article V of the Constitution and By-laws of the Citizen Band Potawatomi Indians of Oklahoma.

(3) "Tribal Trust Lands" shall mean the lands and waters lying within the boundaries of the property described below:

Tract Numbered 1

The northeast quarter northeast quarter, southeast quarter northeast quarter, southwest quarter northeast quarter section 31, township 10 north, range 4 east. Indian meridian. Pottawatomie County, Oklahoma, containing 120.00 acres, more or less.

Tract Numbered 2

That part of the northwest quarter southeast quarter section 31, township 10 north, range 4 east. Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the southwest corner of said northwest quarter southeast quarter; thence east 1,320 feet; thence north 1,320 feet; thence west 1,320 feet to the center of said section; thence south 167 feet; thence east 183 to the intersection with the west line of the Atchison, Topeka, and Santa Fe Railroad right-of-way; thence southwesterly along the west right-of-way line a distance of 856 feet to the intersection with a point in the west line of northwest quarter southeast quarter, said point being 983 feet south of the center of section 31; thence south along the west

line of the northwest quarter southeast quarter, a distance of 337 feet, to the point of beginning; containing 38.29 acres, more or less.

Tract Numbered 3

That part of the southeast quarter northwest quarter section 31, township 10 north, range 4 east, Indian meridian. Pottawatomie County, Oklahoma, described as: Beginning at the northeast corner of said southeast quarter northwest quarter; thence south 1,320 feet to the center of said section 31; thence west along the south line of said southeast quarter northwest quarter a distance of 1,255.4 feet to the intersection with the centerline of Oklahoma State Highway Numbered 18; thence northwesterly along the centerline of the highway a distance of 660.58 feet to a point on the south line of the northwest quarter southeast quarter northwest quarter; thence east 38 feet to the intersection with the east right-of-way line of Oklahoma State Highway Numbered 18; thence northwesterly along the east right-of-way line to a point in the north line of said southeast quarter northwest quarter said point being 58 feet east of the northwest corner of said southeast quarter northwest quarter, thence east a distance of 1,262 feet to the point of beginning containing 38.83 acres more or less.

Tract Numbered 4.

That part of the northeast quarter southwest quarter section 31 township 10 north, range 4 east Indian meridian Pottawatomie County, Oklahoma described as: Beginning at the northeast corner of said northeast quarter

southwest quarter, said point being the center of section 31 thence south 167 feet; thence west 1,302 feet to the intersection with the west line of the right-of-way of Oklahoma State Highway Numbered 18 thence northeasterly along the west right-of-way line a distance of 167 feet to the north line of said northeast quarter southeast quarter thence east along said north line a distance of 1,297.4 feet to the point of beginning containing 4,678 acres, more or less.

Tract Numbered 5.

That part of the northeast quarter southwest quarter section 31 township 10 north range 4 east Indian mendian Pottawatomie County, Oklahoma described as: Beginning at the southeast corner of said northeast quarter southwest quarter; thence north along the east line of said northeast quarter southwest quarter a distance of 337 feet to the intersection with the west right-of-way line of the Atchison Topeka and Santa Fe Railroad right-of-way thence southwesterly along said west right-of-way line a distance of 367 feet to the intersection with the south line of said northeast quarter southwest quarter thence east along the south line a distance of 129 feet to the point of beginning containing 498 acre more or less.

Tract Numbered 7.

That part of lot 1 (northwest quarter of northwest quarter) and north half of lot 2 (north half of southwest quarter of northwest quarter) and the part of the north half of the southeast quarter of the northwest quarter lying west of the east right-of-way line of Oklahoma State

Highway Numbered 18, all in section 31 township 10 north range 4 east Indian meridian. Pottawatomie County, Oklahoma containing 57.99 acres more or less subject to the right of the Absentee Shawnee Tribe of Indians of Oklahoma the Sac and Fox Tribe of Indians of Oklahoma the Kickapoo Tribe of Indians of Oklahoma and the Iowa Tribe of Indians of Oklahoma to use the Pottawatomie community house that may be constructed and maintained thereon.

[4] "Member" shall mean any person whose name appears on the official roll of the Citizen Band Potawatomi Indians of Oklahoma.

[5] "Commercial Sale" shall mean the transfer, exchange or barter in any or by any means whatsoever for a consideration by any person, association, partnership, or corporation of cigarettes tobacco products and/or liquor and beer products.

[6] "Wholesale Price" shall mean the established price for which cigarettes, tobacco products and/or liquor and beer products are sold to the Citizen Band Potawatomi Indians of Oklahoma or any licensed operator by the manufacturer or distributor exclusive of any discount or other reduction.

[7] "Tobacco Products" shall mean cigars, cheroots, stogies, granulated plug cut, crim cut, ready rubbed, and other smoking tobacco, snuff, cavendish, snuff flour, plug and twist tobacco, five cut and other chewing tobacco shorts and other kinds and forms of tobacco prepared in such a manner as to be suitable for chewing or smoking in a pipe or otherwise or both for smoking and chewing Tobacco products shall include cigarettes.

[8] "Cigarette" shall mean any roll for smoking made wholly or in part of tobacco being flavored adulterated or mixed with any other ingredient where such wrapper is wholly or in any part made of paper or any material except where such is wholly or in the greater part made of natural leaf tobacco in its natural state.

[9] "Tobacco Outlet" shall mean a tribally licensed retail sales business selling tobacco products on tribal trust lands of the Citizen Band Potawatomi Indians of Oklahoma

[10] "Alcohol" is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine which is produced by the fermentation or distillation of grain, starch molasses or sugar, or other substances including all dilutions and mixtures of this substance.

[11] "Beer" means any beverage obtained by the alcohol fermentation of an infusion or decoction of pure hops, or pure extract of hops, and malt and sugar in pure water containing not more than 6% of alcohol by weight.

[12] "Liquor Outlet" shall mean a tribally licensed retail sale business selling liquor or beer on tribal trust lands.

[13] "Operator" shall mean all enrolled members of twenty-one years of age and over of the Citizen Band Potawatomi Indians of Oklahoma or enrolled members of twenty-one years of age and over of another federally recognized Tribe of American Indians licensed by the Citizen Band Potawatomi Indians of Oklahoma to operate a tobacco and/or liquor and beer outlet.

1.3 Licensing of Tobacco or Liquor and Beer Outlets.

1-3.01 Licensing. The Citizen Band Potawatomi Indians of Oklahoma Business Committee shall be the Citizen Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission. The Commission is empowered to.

[1] Administer these regulations by exercising general control, management, and supervision of all tobacco and/or liquor and beer sales, places of sale and sales outlets as well as exercising all powers necessary to accomplish the purposes of these regulations.

[2] Adopt and enforce rules and regulations in furtherance of the purpose of these regulations and in the performance of its administrative functions.

1-4 Nature of Outlet.

1-4.01 Nature of Outlet Each tobacco and/or liquor and beer outlet, license granted by the Commission hereunder, shall be managed pursuant to a Federal Indian Trader's License provided in Section 1-7 hereof.

1-5 Application for Tobacco Outlet License or Liquor and Beer Outlet License.

1-5.01 Application. Any enrolled member, twenty-one years of age and older of the Citizen Band Potawatomi Indians of Oklahoma or an enrolled member, twenty-one years of age and older of a federally recognized Tribe may apply to the Commission for a tobacco outlet license and/or a liquor and beer outlet license.

1-5.02 Processing of Application. The Tribal Secretary Treasure shall receive and process applications and be the official representative of the Tribe and Commission in matters relating to tobacco and/or liquor and beer excise tax collections and related matters. The Commission or its authorized representative shall obtain additional information as deemed appropriate. If the Commission or its authorized representative is satisfied that the applicant is a suitable and respectable person, the Commission or its authorized representative may issue a license for the sale of tobacco products and/or liquor and beer products.

1-5.03 Application Fee. Each application shall be accompanied by an application charge or fee of twenty-five dollars ($25.00) An application for both a tobacco outlet license and a liquor and beer outlet license shall be considered to be two applications with an application charge of twenth-five dollars ($25.00) each.

1-6 Tobacco Outlet Licenses Liquor and Beer Licenses.

1-6.01 Upon approval of an application, the Commission shall issue the applicant a tobacco outlet license and/or a liquor and beer outlet license whichever the case may be, for one year from the date of issuance, which shall intitle the operator to establish and maintain only the type outlet being permitted. This license shall not be transferable. It shall be renewable at the discretion of the Commission by submission of the licensee of subsequent application form and payment of application fee as provided in Section 1-5.

1-7 Trader's License.

1-7.01 Trader's License. No tobacco outlet license or liquor and beer outlet license shall be issued to any operator unless he/she has obtained a Federal Indian Trader's License from the Superintendent of the Shawnee Agency. Bureau of Indian Affairs Revocation of the Federal Indian Trader's License shall be grounds for the revocation of their operator's tobacco outlet license and/or liquor and beer outlet license by the Commission.

1-8 Regarding Sales by Liquor Wholesales and transport of Liquors upon Tribal Trust Lands.

1-8.01 Right of Commission Scrutinize Suppliers. The operator of any licensed outlet shall keep the Commission informed in writing of the identity of suppliers and/or wholesalers who supply or are expected to supply tobacco or liquor stocks to the outlet(s) The Commission may, at its discretion, for any reasonable cause limit or prohibit the purchase of said stock from a supplier or wholesaler.

1-8.02 Freedom of Information From Suppliers. Operators shall in their purchase of stock and in their business relations with suppliers cooperate with and assist the free flow of information and date to the Commission from suppliers relating to the sales and business arrangements between the suppliers and operators. The Commission may, at its discretion, require the receipts from the supplies of all invoices, bills of lading, billings or other documentary receits of sales to the operator.

1-9 Sales by Retail Operators.

1-9.01 Commission Regulations. The Commission shall adopt procedures which shall supplement these Regulations and facilitate their enforcement. These procedures shall include limitations on sales to minors, where liquor may be consumed, persons not allowed to purchase alcoholic beverages, hours and days when outlets may be open for business and other appropriate matters and controls.

1-9.02 Sales to Minors. No Tribal operator shall give, sell, or otherwise supply liquor to any person under twenty-one (21) years of age either for his or her own use or for the use of his or her parents or for the use of any other person.

1-9.03 Consumption of Liquor Upon Licensed Premises. No Tribal operator shall permit any person to open or consume liquor on his or her premises or any premises adjacent thereto and in his or her control. Provided the Commission will identify specific locations upon Tribal Trust Lands where beer and/or alcohol may be consumed.

1-9.04 Conduct on Licensed Premises.

(1) No Tribal operator shall be disorderly, boisterous or intoxicated on the licensed premises or on any public premises adjacent thereto which are under his or her control, nor shall he or she permit any disorderly, boisterous or intoxicated person to be thereon nor shall he or she use or allow the use of profane or vulgar language thereon.

(2) No operator shall permit suggestive, lewd, or obscene conduct or acts on his or her premises. For the purpose of this section, suggestive, lewd, or obscene acts or conduct shall be those acts or conduct identified as such by the laws of the State of Oklahoma.

1-9.05 Employment of Minors. No person under the age of twenty-one (21) years of age shall be employed in any service in connection with the sale or handling of liquor, either on a paid or voluntary basis, except as otherwise provided herein. Employees eighteen [18] years or older may sell or handle beer or wine provided that there is direct supervision by an adult twenty-one (21) years of age or older.

1-9.06 Operator's Premises Open to Commission Inspection. The premises of all operators, including vehicles used in connection with liquor sales, shall be open at all times to inspection by the Citizens Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission or its designated representative.

1-9.07 Operator's Records. The originals or copies of all sales slips, invoices, and other memoranda covering all purchases of liquor by operators shall be kept in file in the retail premises of the operator purchasing the same for at least five (5) years after each purchase and shall be filed separately and kept apart from all other records and as nearly as possible shall be filed in consecutive order and each month's records kept separate so as to render the same readily available for inspection and checking. All cancelled checks, band statements and books of accounting covering of involving the purchase of liquor, and all memoranda, if any, showing payment of money

for liquor other than by check, shall be likewise preserved for availability for inspection and checking.

1-9.08 Records Confidential. All records of the Citizen Band Potawatomi Indians of Oklahoma Tobacco Liquor and Beer Control Commission showing purchase of liquor by any individual or group shall be confidential and shall not be inspected except by members of the Commission or its authorized representative.

1-9.09 Conformity With State Law. Operators shall comply with State of Oklahoma liquor standards to the extent required by 18 USC 1161. However, total jurisdiction over the sale of liquor and beer products is reserved to and exercised by the Citizen Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission within the boundaries of Tribal Trust Lands.

1-10 Tribal Excise Tax Imposed Upon Distribution of Tobacco and Liquor.

1-10.01 Tribal Excise Taxes. The Commission shall by resolution include a provision for the taxing of sales of cigarettes, tobacco and liquor and beer products to the consumer or purchaser. Such tax shall be in amounts equal to at least 5% of all retail sales prices, but the Commission may establish tax rates in excess of that 5% for any given class of merchandise.

1-10.02 Added to Retail Price. The excise tax levied hereunder shall be added to the retail selling price of tobacco products and/or liquor and beer products sold to the ultimate consumer.

1-11 Liability for Bills.

1-11.01 Liability for Bills. The Tribe shall have no legal responsibility for any unpaid bills owed by a tobacco outlet and/or liquor and beer outlet to a wholesale supplier or any other person.

1-12 Other Business By Operator.

1-12.01 Other Business by Operator. An operator may conduct another business simultaneously with managing a tobacco outlet and/or liquor and beer outlet, PROVIDED, such other business must be approved prior to initiation by majority vote of the Citizen Band Potawatomi Indians of Oklahoma Business Committee. Said other business may be conducted on the same premises as a tobacco outlet and/or liquor and beer outlet, but the operator shall be required to maintain separate books of account for the other business.

1-13 Tribal Liability and Credit.

1-13.01 Operators are forbidden to represent or give the impression to any supplier or person with whom he or she does business that he or she is an official representative of the Tribe or the Commission authorized to pledge tribal credit or financial responsibility for any of the expenses of his or her business operation. The operator shall hold the Citizen Band Potawatomi Indians of Oklahoma harmless from all claims and liability of whatever nature. The Commission shall revoke an operator's outlet license(s) if said outlet(s) is not operated in a businesslike manner or if it does not remain financially

solvent or does not pay its operating expenses and bills before they become delinquent.

1-13.02 Insurance. The operator shall maintain at his or her expense adequate insurance covering liability, fire, theft, vandalism, and other insurable risks. The Commission or the Business Committee may establish as a condition of any license, the required insurance limits and any additional coverages deemed advisable.

1-14 Audit and Inspection.

1-14.01 All of the books and other business records of the outlet shall be available for inspection and audit by the Commission or its authorized representative for any reasonable time.

1-14.02 Bond For Excise Tax. The excise tax together with reports on forms to be supplied by the Commission shall be remitted to the Tribal office monthly unless otherwise specified in writing by the Commission. The operator shall furnish satisfactory bond to the Tribe in an amount to be specified by the Commission guaranteeing his or her payment of excise taxes.

1-15 Revocation of Operator's License.

1-15.01 Revocation of Operator's License. Failure of an operator to abide by the provision of these regulations and any additional regulations or requirements imposed by the Commission will constitute grounds for revocation of the operator's license as well as enforcement of the penalties provided in 1-16.

1-16 Violation – Penalties.

1-16.01 Any Indian violating these Regulations shall be guilty of an offense and subject to a fine of not less than fifty dollars ($50.00) and not to exceed a maximum of two hundred-fifty dollars ($250.00). Any operator who violates the provisions set forth herein shall forfeit all of the remaining stock in the outlet(s). The Tribe shall be empowered to seize forfeited products.

1-17 Separability.

1-17.01 If any provision of the Regulations in its application to any person or circumstance is held invalid the remainder of the Regulations and their application to other persons or circumstances is not affected.

EXHIBIT B

(SEAL)

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

2501 LINCOLN BLVD.
OKLAHOMA CITY, OKLAHOMA 73194
February 2, 1987

CINDY RAMBO, Chairman
ROBERT L. WADLEY, Vice-Chairman
DON KILPATRICK, Sec'y-Member

Business Tax
DIVISION
Alcohol &
Tobacco (illegible)

(405) 521-3270

Mr. John A. Barrett
DBA: Gallery Trading Post
Route 5, Box 151
Shawnee, OK 74801

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

RE: Proposed Assessment of Penalty and Interest in the Amount of $2,691,470.70 for Sale and Distribution of Unstamped Cigarettes

Dear Mr. Barrett:

From an examination and audit of reports, it appears that during the period from December 1, 1982 to September 30, 1986, you sold and/or distributed for consumption 6,134,380 packs of twenty cigarettes each, and 18,780 packs of twenty-five cigarettes each, without stamps affixed thereto as required by law. The amount of tax due upon the sale or distribution of said number of cigarettes is $1,108,413.90.

Pursuant to the provisions of 68 O.S. 1981, Section 305(c) the Oklahoma Tax Commission hereby proposes the assessment against you of $2,216,827.80, said sum being equal to twice the amount of the tax due, plus interest thereon to the date of this letter, in the amount of $363,801.51 and penalty in the amount of $110,841.39; for a total proposed assessment of $2,691,470.70.

If you would wish to protest this proposed assessment, you may file a verified written protest, in triplicate, with the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission within thirty (30) days after the date of mailing this letter, as provided in 68 O.S. 1981, Section 221. If you fail to file a written protest within the thirty day period, this assessment will, without further action

by the Commission, become final and absolute at the expiration of thirty days from the date of mailing shown above. Such final assessment will accrue interest at the rate of eighteen percent (18%) per annum until paid, and further proceedings by way of tax warrant or court action may be had to enforce the state's lien.

Very truly yours,

OKLAHOMA TAX COMMISSION

/s/ Ray A. Freeman
Ray A. Freeman
OPERATIONS SUPPORT SECTION

RAF:ms

CIGARETTE AUDIT

JOHN A BARRETT DBA:
GALLERY TRADING POST — SHAWNEE OK
(Name of Firm) — (Address)

Period of Audit:
From DECEMBER 1982 Through SEPTEMBER 1986

RECAPITULATION

CIGARETTE STAMP ACCOUNT	25 PACK NUMBER OF STAMPS	20 PACK NUMBER OF STAMPS
Stamps on Hand – Opening of Audit		
Purchases – Period of Audit		
Acquired from Other Sources		
TOTAL TO ACCOUNT		
DEDUCTIONS:		NONE
Stamps affixed to Packages		
Stamps Sold		
Other Dispositions		
Total Deductions		
ON HAND – CLOSE OF AUDIT		

UNSTAMPED CIGARETTE ACCOUNT	NUMBER OF UNSTAMPED PACKAGES	
Stock on Hand – Opening of Audit	-0-	-0-
Packages Purchased – Period of Audit	18,780	6,134,380
Acquired from Other Sources		
Unaccounted For		
TOTAL TO ACCOUNT	18,780	6,134,380
DEDUCTIONS:		
Packages Stamped – Period of Audit		
Out of State Shipments		
Drop Shipments		
Sales to Government Agencies		
Returned to Factory		
Lost & Damaged SHORTAGES	18,780	6,134,380

Other Dispositions		
TOTAL DEDUCTIONS	18,780	6,134,380
ON HAND – CLOSE OF AUDIT	-0-	-0-

STAMPED CIGARETTE ACCOUNT	NUMBER OF STAMPED PACKAGES
Stock on Hand – Opening of Audit	
Packages Stamped – Period of Audit	
Stamped Cigarettes Purchased	
TOTAL TO ACCOUNT	
DEDUCTIONS:	NONE
Sales to Licensed Retailers	
TOTAL DEDUCTIONS	
ON HAND – CLOSE OF AUDIT	

~~ADDITIONAL~~ LIABILITY $2,691,470.70
(EXPLANATION – PAGE 2)

Last Stamp purchase order
used in this audit is No. NONE For _____ Stamps

1-30-87 Audited By: Ray A. Freeman
Date of Audit

CIGARETTE AUDIT PERIOD DEC 82 – SEPT 86

EXPLANATION OF LIABILITY:

UNSTAMPED PURCHASES OF 20 PACK

6,134,380 pkgs. @ 18¢ =	$1,104,188.40
18,780 pkgs. @ 22½¢ =	4,225.50
SUBTOTAL	1,108,413.90
SECTION 305, TITLE 68, OKLA. STATUTES	1,108,413.90
10% PENALTY	110,841.39
INTEREST TO FEB. 10, 1987	363,801.51
TOTAL	$2,691,470.70

POTAWATOMI TRIBAL STORE 01/29/87
GALLERY TRADING POST SHAWNEE, OKLA.

CIGARETTE PURCHASES

YEAR	MONTH	20 PACK	25 PACK	TAX DUE	PENALTY	INTEREST
1982	DECEMBER	77100	0	13878.00	1387.80	6800.22
1983	JANUARY	149400	0	26892.00	2639.20	12908.16
1983	FEBRUARY	90000	0	16200.00	1620.00	7614.00
1983	MARCH	93000	0	16740.00	1674.00	7700.40
1983	APRIL	142800	0	25704.00	2570.40	11566.80
1983	MAY	27600	0	4968.00	496.80	3278.88
1983	JUNE	59800	0	10764.00	1076.40	6942.78
1983	JULY	102900	0	18522.00	1852.20	11668.86
1983	AUGUST	102000	0	18360.00	1836.00	11291.40
1983	SEPTEMBER	104400	0	18792.00	1879.20	11275.20
1983	OCTOBER	121800	0	21924.00	2192.40	12825.54
1983	NOVEMBER	109200	0	19656.00	1965.60	11203.92
1983	DECEMBER	53400	0	9612.00	961.20	5334.66
1984	JANUARY	94200	0	16956.00	1695.60	9156.24
1984	FEBRUARY	111600	0	20088.00	2008.80	10546.20
1984	MARCH	93300	0	16794.00	1679.40	8564.94
1984	APRIL	107400	0	19332.00	1933.20	9569.34
1984	MAY	76200	0	13716.00	1371.60	6583.68
1984	JUNE	56100	0	10098.00	1009.80	4695.57
1984	JULY	105600	0	19008.00	1900.80	8553.60
1984	AUGUST	145500	0	26190.00	2619.00	11392.65
1984	SEPTEMBER	129600	0	23328.00	2332.80	9797.76
1984	OCTOBER	161100	0	28998.00	2899.80	11744.19
1984	NOVEMBER	181800	0	32724.00	3272.40	12762.36
1984	DECEMBER	80700	0	14526.00	1452.60	5447.25
1985	JANUARY	176100	0	31698.00	3169.80	11411.28
1985	FEBRUARY	104400	0	18792.00	1879.20	6483.24
1985	MARCH	197460	0	35542.80	3554.28	11729.12
1985	APRIL	132600	0	23868.00	2386.80	7518.42
1985	MAY	234000	0	42120.00	4212.00	12636.00
1985	JUNE	120000	0	21600.00	2160.00	6156.00
1985	JULY	233400	0	42012.00	4201.20	11343.24
1985	AUGUST	135900	900	24664.50	2466.45	6289.43
1985	SEPTEMBER	145800	0	26244.00	2624.40	6298.56
1985	OCTOBER	220500	720	39852.00	3985.20	8966.70
1985	NOVEMBER	118200	1200	21546.00	2154.60	4524.66
1985	DECEMBER	134700	0	24246.00	2424.60	4727.97
1986	JANUARY	308700	0	55566.00	5556.60	10001.88
1986	FEBRUARY	135840	0	24451.20	2445.12	4034.44
1986	MARCH	145200	2400	26676.00	2667.60	4001.40
1986	APRIL	214200	960	38772.00	3877.20	5234.22
1986	MAY	208320	1440	37821.60	3782.16	4538.59
1986	JUNE	46500	480	8478.00	847.80	890.19
1986	JULY	209160	3960	38539.80	3853.98	3468.58
1986	AUGUST	215100	3840	39582.00	3958.20	2968.65
1986	SEPTEMBER	121800	2880	22572.00	2257.20	1354.32
TOTALS		6134380	18780	1108413.90	110841.39	363801.51
				GRAND TOTAL		1583056.80

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff	)	
vs.	)	
THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission, Defendants.	)	No. CIV-87-0338W

ANSWER AND COUNTER-CLAIM

(Filed Mar 19, 1987)

COMES NOW the Defendants above named, and for their Answer and Counter-Claim, allege and state:

ANSWER

I

Defendants admit that jurisdiction and venue are properly before this Court.

II

Defendants admit that Plaintiff is a federally recognized tribe. The defendants are without knowledge as to the precise location of Plaintiff's headquarters and therefore deny that the same is located on Indian country as alleged in Paragraph 3 of plaintiff's complaint.

III

Defendants admit the allegations contained in Paragraph 4 except that Defendants deny that Cindy Rambo is a member of the Oklahoma Tax Commission.

IV

Defendants deny the allegations contained in Paragraph 5 of plaintiff's complaint.

V

The Defendants admit that portion of the facts and allegations contained in Paragraph 6 of plaintiff's complaint which alleges that plaintiff has adopted a constitution establishing a tribal government. Defendants are unaware of amendments to the constitution and therefore deny the last sentence of Paragraph 6.

VI

Defendants admit the allegations contained in Paragraphs 7, 8, and 9 of plaintiff's complaint.

VII

Defendants admit that plaintiff has never had a license to sell cigarettes as alleged in Paragraph 10 of plaintiff's complaint. Defendents deny the remainder of Paragraph 10.

VIII

Defendants admit the allegations contained in Paragraphs 11, 12 and 13 of plaintiff's complaint, and further allege that the Defendant, Oklahoma Tax Commission, intends to proceed with collection efforts against plaintiff for cigarette excise taxes due the State of Oklahoma.

IX

Defendants are without knowledge of the truth or accuracy of the allegations contained in Paragraphs 14 and 15 of plaintiff's complaint. However, Defendants state that these allegations are irrelevant.

X

Defendants deny the allegations contained in Paragraph 16 of plaintiff's complaint in so far as the notification by letter is alleged to be an assessment. Defendant alleges the notification is a proposed assessment which may be duly protested pursuant to state law. Paragraph 16 in all other respects is admitted.

XI

Defendants admit the allegations contained in Paragraphs 17, 18 and 19 of plaintiff's complaint and further allege that John Barrett had filed a protest with the Oklahoma Tax Commission prior to the commencement of this action by Plaintiff; that said letter of protest had been reviewed and the proposed assessment was in the process of being withdrawn at the time plaintiff's action was filed, because the proposed assessment as issued contained clerical errors.

XII

Defendants admit that Barrett does not do business as The Gallery Trading Post as alleged in Paragraph 20 of plaintiff's complaint, however, Defendants deny the remainder of Paragraph 20.

XIV

Defendants state that the allegations in Paragraph 22 of plaintiff's complaint are overly broad and cannot be admitted or denied.

XV

Defendants deny the allegations contained in Paragraphs 23, 24 and 25 of plaintiff's complaint and further state that these allegations are now moot because the proposed assessment against plaintiffs officer has been withdrawn.

XVI

Defendants deny the allegations contained in Paragraphs 26 and 27 of plaintiff's complaint.

WHEREFORE, Defendants pray that plaintiff be denied this injunctive relief requested in the Complaint.

COUNTER-CLAIM

For its Counter-Claim against the plaintiff herein, Defendants allege and state:

I

That jurisdiction and venue are properly before this Court.

II

CAUSE OF ACTION

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

A. This counter-claim is brought pursuant to Rule 18(a) of the Federal Rules of Civil Procedure.

B. That Plaintiff has sold and continues to sell cigarettes within the State of Oklahoma to the general public upon which State cigarette excise tax and sales tax has not been paid.

C. That said actions of the Plaintiff are in violation of the State's laws and the federal common law as set forth in *Moe v. Confederated Salish and Kootenai Tribes,* 425

U.S. 463 (1976), *Washington v. Confederated Tribes of Colville,* 447 U.S. 134 (1980) and *California State Board of Equalization v. Chemehuevi Indian Tribe,* ___ U.S. ___, 106 S.Ct. 289 (1985).

D. As a result of the actions of the Plaintiff, the Defendants have suffered and continue to suffer immediate and imparable harm for which declaratory and injunctive relief must be granted.

E. The Defendants ask that this Court:

1. Assume and maintain jurisdiction over these matters.
2. Issue an Order declaring and setting forth the respective rights and jurisdictions of the Parties.
3. Issue an Order declaring that the jurisdiction of the Defendant Oklahoma Tax Commission extends to taxing the Plaintiff's sales.
4. Issue an Order declaring that the jurisdiction of the Defendant Oklahoma Tax Commission extends to enforcing its tax laws by way of assessments and injunctions.
5. Issue an Order enjoining Plaintiff from selling cigarettes upon which State excise tax and sales tax are not collected and remitted.
6. Grant all costs, fees, and other relief as the facts and the interests of justice may warrant to these Defendants.

Respectfully submitted,

OKLAHOMA TAX COMMISSION

J. LAWRENCE BLANKENSHIP
General Counsel

By: /s/ Robert C. Jenkins
Robert C. Jenkins
2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141
Attorney for Defendants

CERTIFICATE OF MAILING

I certify that on the 18th day of March, 1987, a true and correct copy of the above and foregoing was mailed to:

Michael Minnis and David McCullough
Pierson, Ball and Dowd
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102

/s/ Robert C. Jenkins
Robert C. Jenkins

sb

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BANK POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Plaintiff,	)	
v.	)	
THE OKLAHOMA TAX COMMISSION; CINDY RAMBO, Chairman of the Oklahoma Tax Commission; ROBERT L. WADLEY, Vice-Chairman of the Tax Commission; and DON KILPATRICK, Secretary of the Tax Commission, Defendants.	)	CIV-87-0338-W

ORDER

(Filed May 29, 1987)

This matter comes before the Court on the plaintiff's Motion to Dismiss Counterclaim wherein dismissal is sought on the grounds that this Court is without jurisdiction over the counterclaim, that this Court is without jurisdiction over the plaintiff for purposes of the counterclaim and that the defendants have failed to state a counterclaim upon which relief in this Court can be granted.

The defendants, Oklahoma Tax Commission, Cindy Rambo, then Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman, and Don Kilpatrick, Secretary, have responded in opposition to the motion, and based upon the parties' submissions, the Court makes the following determination.

The plaintiff, The Citizen Bank Potawatomi Indian Tribe of Oklahoma, is a federally-recognized Indian tribe which brought this action to enjoin the defendants from enforcing or attempting to enforce the regulatory and taxing authority of the state of Oklahoma to assess a cigarette tax against the plaintiff. The lawsuit was prompted by a proposed tax assessment (since amended and now directed towards the plaintiff) which was issued by the defendants and which advised the plaintiff that it owed certain amounts, including a penalty, for its sale of cigarettes without stamps affixed to the packages as required by Oklahoma law.

The defendants answered the plaintiff's allegations in its complaint and also counterclaimed against the plaintiff. The relief sought in the counterclaim is a declaration that the plaintiff's actions in selling packages of cigarettes without stamps affixed thereto is violative of Oklahoma law and to enjoin the plaintiff from continuing this practice.

The plaintiff has argued first that this Court is without subject matter jurisdiction over the counterclaim because it is a permissive counterclaim and there is no independent jurisdictional basis for the same alleged by the defendants. Despite the plaintiff's characterization of the pleading, the Court finds that the counterclaim is a

compulsory counterclaim, Rule 13(a), Fed. R. Civ. P. ("arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"), and thus needs no independent jurisdictional basis.

The plaintiff has also argued pursuant to Rule 12(b)(6), Fed. R. Civ. P., that the counterclaim has failed to state a claim for relief and in particular that the relief sought by the defendants is available in state administrative proceedings and thus not available in this forum. The Court is aware of the existence of the state proceeding but in light of the compulsory nature of the counterclaim, the Court finds not only that the defendants have stated a counterclaim upon which relief can be granted but also that the defendants are not precluded from litigating such claim in this forum.

The plaintiff has finally argued that this Court cannot exercise in personam jurisdiction over this plaintiff for purposes of the counterclaim due to the bar imposed by sovereign immunity. The plaintiff has contended that it has submitted to this Court's jurisdiction only for the limited purpose of securing the equitable relief it seeks but that it has not consented to suit on the defendants' counterclaim.

The Court is aware that generally no affirmative relief may be given against a sovereign absent its consent. Nevertheless, in this instance, the Court finds that the relief sought by the defendants is so intertwined with the relief sought by the plaintiff that the counterclaim falls within the scope of waiver contained in the plaintiff's complaint. *E.g., Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir. 1982) (when sovereign sues it waives

immunity as to claims of defendant which assert matters in recoupment – arising out of same transaction or occurrence and to the extent of defeating sovereign's claim but not to extent that claim seeks relief which is different in kind or nature).

Accordingly, the Court finds that it has jurisdiction over both the subject matter of the counterclaim and the plaintiff/counterclaim defendant and that the plaintiff's Motion to Dismiss should be and is hereby DENIED.

IT IS SO ORDERED this 29th day of May, 1987.

/s/ Lee R. West
LEE R. WEST
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND
POTAWATOMI INDIAN
TRIBE OF OKLAHOMA,

Plaintiff,

v.

THE OKLAHOMA TAX
COMMISSION; CINDY
RAMBO, CHAIRMAN OF THE
TAX COMMISSION; ROBERT L.
WADLEY, VICE-CHAIRMAN OF
THE TAX COMMISSION; AND
DON KILPATRICK, SECRETARY
OF THE TAX COMMISSION,

Defendants.

No. CIV-87-0338W

JUDGMENT

(Filed Jan 4, 1990)

On November 29, 1989, mandate from the United States Court of Appeals for the Tenth Circuit was filed in the above-styled case. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303 (10th Cir. Okl. 1989).* Subsequently, plaintiff moved for judgment consistent therewith. Accordingly, consistent with the mandate, this Court hereby finds and concludes as follows:

FINDINGS OF FACT

Indian County

1. The plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Citizen Band"), is a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and is duly recognized as an Indian tribe by the United States Secretary of the Interior (the Secretary).

2. The defendants are the Oklahoma Tax Commission and its appointed members acting in their official capacities.

3. The Potawatomi Indians originally resided around the Great Lakes in Indiana, Illinois, Wisconsin and Michigan.

4. The "Pottowautomie Nation" was removed by the Treaty of June 5 and 17, 1846, to a thirty-square-mile reservation in Kansas.

5. Pursuant to the Treaty of November 15, 1861 (as amended by the Treaty of March 29, 1866), the reservation was divided into individual allotments. When the sale of these allotments produced poverty, the Potawatomi Indians were divided into two bands – the Prairie Band, which remained in Kansas, and the Citizen Band, which was removed to Oklahoma.

6. The Treaty of February 27, 1867, provided for a thirty-square-mile tract in Oklahoma for the Citizen Band. This area was approved as a reservation on November 9, 1870, by the Secretary and it included most of Pottawatomie County, part of eastern Cleveland

County, part of southeastern Oklahoma County and a few acres in southwestern Lincoln County.

7. On May 23, 1872, the Citizen Band agreed to have a portion of its reservation allotted to tribal members. The allotments began in 1875 and continued for fifteen years until the passage of the General Allotment Act of 1887 (The Dawes Act). In 1891, the Citizen Band reservation was divided into allotments; unallotted land either was considered "surplus" and sold to non-Indians or was retained by the federal government.

8. On September 13, 1960, the federal government after concluding certain of this retained land was also surplus, conveyed to the Citizen Band 57.99 acres in Pottawatomie County. The legislation authorizing this conveyance stated that the property would be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership.

9. On August 11, 1964, the federal government conveyed seven additional tracts, 255.196 acres, to the Citizen Band in Pottawatomie County. The legislation conveying these seven tracts as it pertained to tracts numbered six and seven likewise stated that these tracts were not exempt from taxation or restriction on use, management or disposition because of Indian ownership.

10. On September 16, 1971, the Citizen Band by resolution asked the federal government to accept all conveyed land in trust. This resolution expressly noted that the lands to be conveyed to the federal government were subject to no restrictions because of Indian ownership and requested that the lands should be redesignated restricted lands.

11. On February 18, 1974, the Mayor and the Board of Commissioners of the City of Shawnee passed a resolution wherein they endorsed the Citizen Band's request for trust status of the land.

12. On January 2, 1975, Congress authorized the Citizen Band to convey seven tracts, 279.956 (the 57.99 acres included in the 1960 conveyance and the first six tracts included in the 1964 conveyance) to the United States in trust for the benefit and use of the Citizen Band.

13. On May 27, 1976, this was accomplished.

14. The Citizen Band owns and operates a convenience store called the "Potawatomi Tribal Store a/k/a The Gallery Trading Post". The store was constructed by the Citizen Band with federal funds secured from a Community Development Block Grant program sponsored by the United States Department of Housing and Urban Development.

15. The land upon which this tribal store is located was included in the unallotted land that was retained by the federal government in 1891. It was held by the federal government until 1964 when it was included in the 255.196 acres conveyed to the Citizen Band. It was then returned to the federal government in trust for the benefit and use of the Citizen Band in 1976.

Taxation

16. The tribal store sells packages of cigarettes to all persons of legal age.

17. No records are kept which distinguish between sales to tribal members, other Indians and non-Indians.

18. Under Oklahoma law, the defendants enforce state taxing laws including a cigarette tax which requires those selling cigarettes in the State of Oklahoma to be licensed and to purchase and affix state tax stamps before selling cigarettes.

19. The Citizen Band has never purchased a license to sell cigarettes from the State of Oklahoma.

20. The Citizen Band does not and has never collected state sales tax on packages of cigarettes.

21. The Citizen Band imposes a tribal tax on the cigarettes sold and all packages of cigarettes sold bear a tribal tax stamp.

22. The Citizen Band's tobacco ordinance has been approved by the Department of Interior-Bureau of Indian Affairs.

23. The money generated by the sale of cigarettes goes into the tribal general fund for the use and benefit of the Citizen Band.

24. As of September 30, 1985, gross annual sales for the tribal store totalled $1,764,704.00 and the Citizen Band had gross annual operating revenues from all sources of $2,158,906.00.

25. On March 5, 1987, the Citizen Band received a proposed assessment in the amount of $2,671,470.70 for state cigarette taxes allegedly due for cigarette sales at the tribal store from December 1, 1982, to September 30, 1986.

26. The Citizen Band is only seeking injunctive relief. The Citizen Band is not seeking a declaratory judgment or damages. *Citizen Band Potawatomi Indian Tribe, supra p. 1305.*

CONCLUSIONS OF LAW

Indian Country

1. "Indian Country" has been defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States government . . . ," *18 U.S.C. § 1151(a).* Although this statute was enacted for purposes of determining federal criminal jurisdiction, it is equally applicable in civil cases. *E.g. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 206 n. 5 (1987).*

2. Because validly set apart for use by the Tribe, the Citizen Band's original reservation was Indian Country. *See doc. no. 52, order, p. 6, filed 4/15/88* (hereafter "April 15th Order").

3. The term "Indian reservation" has been used in various ways and "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status." *Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987).* The Tenth Circuit noted that:

> For purposes of defining Indian Country, the term simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.

Id.

4. "[L]ands held in trust by the United States for the tribes are Indian Country within the meaning of § 1151(a)." *Cheyenne-Arapaho Tribe v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980).*

5. The Potawatomi Tribal Store, a/k/a/The Gallery Trading Post, is located on land which is "located within the original Potawatomi reservation boundaries" and which, "during all relevant periods of time, was held in trust by the federal government" for the Citizen Band. Thus, the store is "located in Indian Country". *Citizen Band Potawatomi Indian Tribe, supra p. 1306.*

Taxation

6. Oklahoma has disclaimed jurisdiction over Indian land. *See Indian County, 829 F.2d at 976-81.* The effect of this disclaimer of jurisdiction " 'is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished' ". *Id. at 980 (quoting S. Rep. No. 699, 83d Cong., 1st Sess., reprinted in [1953] U.S. Code & Admin. News 2409, 2412).*

7. Oklahoma has not asserted jurisdiction over Indian Country under Public Law 280, nor pointed to a "voluntary grant of jurisdiction" by the Citizen Band. *Citizen Band Potawatomi Indian Tribe, supra p. 1307.*

8. Because the convenience store is located in Indian Country, the Citizen Band possesses "sovereign powers with respect to the land and the store. *See United States v. Wheeler, 435 U.S. 313, 323 (1978)." Citizen Band Potawatomi Indian Tribe, supra p. 1306.*

9. Because the convenience store is located on land over which the Citizen Band retains sovereign powers, "Oklahoma has no authority to tax the store's transactions" absent "an independent jurisdictional grant of authority from Congress". *Id.*

10. The Citizen Band is not only exempt from payment of state sales tax (such exemption is recognized and acknowledged by the defendants' pleadings to this Court) but also is immune from liability for the assessment issued by defendants on March 5, 1987 for taxes due for sale of cigarettes from December 1, 1982 to September 30, 1986. *April 15th Order, supra p. 9.* The instant assessment against the Citizen Band for payment of cigarette sales tax unremitted from 1982 to 1986 is improper. *Id. at 12.*

11. Absent injunctive relief, the Citizen Band will suffer irreparable damage.

12. The Citizen Band has no adequate remedy at law.

Counterclaim

13. "Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress." *Citizen Band Potawatomi Indian Tribe, supra p. 1304; citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940); Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165, 172-73 (1977).*

14. An Indian tribe "does not consent to suit on a counterclaim merely by filing as a plaintiff". *See Fidelity & Guaranty Co., 309 U.S. at 513.* "Although the precise limits

of this tribal immunity are not clear, . . . it is generally co-extensive with that of the United States." *Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1344 (10th Cir. 1982).*

15. The "compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a Congressional waiver of the Tribe's immunity. . . .Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately." *Chemehuevi Indian Tribe v. California Board of Equalization, 757 F.2d 1047, 1053 (9th Cir.), rev'd. on other grounds, 474 U.S. 9 (1989).*

16. Although a "counterclaim may be asserted against a sovereign by way of set-off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent." *United States v. Agnew, 423 F.2d 513, 514 (9th Cir. 1970).*

17. Recoupment is an equitable defense that applies only to suits for money damages. "[R]ecoupment is purely defensive and not offensive . . . [and applies] only to abatement, reduction, or mitigation of the *damages* claimed by plaintiff." *80 C.J.S. Set-Off and Counterclaim, § 2 (1953) (emphasis added).* Because of the tribal immunity from suit, this Court has no jurisdiction "to adjudicate the counterclaim". *Citizen Band Potawatomi Indian Tribe, supra p. 1305.*

Therefore, in accordance with the findings of fact and conclusions of law had herein, IT IS ORDERED AND ADJUDGED:

1. That, to the extent inconsistent herewith, the order of this Court filed herein on April 15, 1988 is hereby VACATED;

2. That the judgment of this Court entered on May 6, 1988 is hereby VACATED;

3. That the defendants are immediately and permanently ENJOINED from assessing any state sales taxes against and/or collecting any state sales taxes from the plaintiff;

4. That the defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or partipation with them, are permanently ENJOINED from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe, the Tribe's officers, agents or employees;

5. That the defendants' counterclaim for declarative and injunctive relief is DISMISSED;

6. That the plaintiff is awarded its costs herein.

Consistent with *Local Rule 6(E),* plaintiff has fifteen (15) days after entry of this judgment to file an application for costs.

Dated at Oklahoma City, Oklahoma, this 4th day of January, 1990.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 1-4-90

APPENDIX E

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

2501 LINCOLN BLVD.
OKLAHOMA CITY, OKLAHOMA 73194

May 3, 1978

JAMES E. WALKER, Chairman — Sales/Use
JOHN L. GARRETT, Vice-Chairman
J. L. MERRILL, Sec'y-Member — DIVISION

Citizen Band Potawatomi Indians
of Oklahoma
Route 5, Box 151
Shawnee, Oklahoma 74801

Attention: Ms. Rebecca Cryer
Tribal Administrator

Gentlemen:

In reply to your letter of April 26, 1978, please be advised we recognize the Citizen Band Potawatomi Indians of Oklahoma as being exempt from sales tax on your purchases of tangible personal property under the provisions found in Paragraph (i), Section 1305, Article 13, Title 68, O. S. 1971.

You have our permission to reproduce this letter and furnish to your suppliers as evidence of your statutory exemption.

Very truly yours,

OKLAHOMA TAX COMMISSION

/s/ Marvin Jensen
Marvin Jensen
Sales & Use Tax Division

MJ:mbe

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, OKLAHOMA EMPLOYMENT SECURITY COMMISSION, Plaintiff,	)	No.
v.	)	CIV-88-595-A
CHOCTAW NATION OF OKLAHOMA, SEMINOLE NATION OF OKLAHOMA, KIOWA-COMANCHE-APACHE INTERTRIBAL LAND USE COMMITTEE, and PAWNEE TRIBAL RESERVE ENTERPRISE, Defendants.	)	

ORDER

(Filed January 4, 1989)

Under Rule 11 Fed. R. Civ. P., the defendants in the captioned case apply to the Court for an award of costs and attorney's fees. Generally, the defendants contend that the plaintiff's declaratory judgment action was frivolous because, under well-settled principles of sovereign immunity, Indian tribes cannot be sued.[1] The Court has

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[1] In April 1988, the plaintiff filed the instant action, seeking a declaration that 26 U.S.C. §3305(d) authorized Oklahoma to impose unemployment compensation taxes on Indian tribes and their instrumentalities. In August 1988, the Court dismissed the case on jurisdictional grounds. The Court observed that the plaintiff's Complaint did not allege a waiver of sovereign immunity by the Indian defendants or "any effective congressional abrogation of it."

considered the parties' submissions, as they pertain to the Rule 11 question. For the reasons noted below, the defendants' application for costs and attorney's fees is granted.

Under Rule 11, courts are obligated to impose sanctions on parties or their attorneys, or both, for the filing of frivolous pleadings – that is, pleadings that are unwarranted by existing law or good faith arguments for the extension, modification, or reversal of existing law. *See, e.g., Chevron USA, Inc. v. Hand*, 763 F.2d 1184, 1186-87 (10th Cir. 1985); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §§1333-34 (1969 & Supp. 1987). However, Rule 11 sanctions are not imposed lightly. Eschewing the wisdom of hindsight, courts merely require that the pleadings state "a plausible view of the law." Fed. R. Civ. P. 11 advisory committee's note; *see Eastway Construct. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985), *cert. den.*, 108 S.Ct. 269 (1987); *Gilmer v. City of Cleveland*, 617 F.Supp. 985, 988-89 (N.D. Ohio 1985); *Johnson v. Veterans Administration*, 107 F.R.D. 626, 628 (N.D. Miss. 1985).

Under the substantive law at issue, Indian tribes are, indeed, sovereign nations and, as such, cannot be sued. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); F. Cohen, Handbook of Federal Indian Law 324 (1982 ed.); *see also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1072 (1982) [hereinafter *Tribal Immunity*] (discussing the traditional policy bases for tribal sovereign immunity). The plaintiff argues, however, that its declaratory judgment action was reasonable given the Supreme Court's decision in *National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 2447 (1985). The *National Farmers* Court held that federal question jurisdiction supported the non-Indian plaintiff's suit against an Indian

tribe, which was aimed at escaping the civil jurisdiction of the tribal court, because the scope of tribal sovereignty as to non-Indians has traditionally been a matter of federal law, including federal common law. 105 S.Ct. at 2451-52. Based on *National Farmers*, apparently, the plaintiff reasons that this Court could have reasonably entertained its lawsuit against the otherwise immune Indian tribes because a federal question bearing on tribal sovereignty was presented by the plaintiff's action – namely, the construction of 26 U.S.C. §3305(d). *See supra* note 1.

Even assuming that the plaintiff's reasoning from the *National Farmers* case is plausible, however, the plaintiff's reliance on that case here is misguided because, in fact, under well-settled jurisdictional principles, the plaintiff's action does not present a federal question.[2] That is, under the well-pleaded complaint rule, the plaintiff's Complaint does not evidence federal law as an essential element of the plaintiff's lawsuit. *See Arden-Mayfair, Inc. v. Louart Corp.*, 434 F.Supp. 580, 583 (D. Del. 1977); 10A C. Wright,

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[2] The plaintiff's reasoning from the *National Farmers* case is weak, if not implausible, for at least two reasons. First, the sovereign immunity issue was not before the *National Farmers* Court and no language of the decision addresses the issue. Second, under the plaintiff's reasoning, courts could presumably reach the merits of any lawsuit against Indian tribes that involves a federal question implicating tribal sovereignty. Yet, judicial incursions on the sovereign immunity doctrine have been few and narrowly tailored. *See Santa Clara Pueblo*, 436 U.S. at 55-60; *Dry Creek Lodge, Inc. v. Arapahoe & Soshone Tribes*, 623 F.2d 682, 685-86 (10th Cir. 1980) (Holloway, J., dissenting); *Tribal Immunity, supra*, at 1062-64.

A. Miller & M. Kane, *Federal Practice & Procedure* §2767 (1983); *see also Gully v. First National Bank*, 299 U.S. 109, 113-14 (1936). True, on its face, the plaintiff's Complaint seeks a declaration as to the plaintiff's rights under a federal statute. This fact, however, is not determinative on the jurisdictional issue. *See Franchise Tax Bd. v. Construc. Laborers Vac. Trust*, 463 U.S. 1, 19-23 (1983). As plaintiff concedes, at bottom, its cause of action is based on Oklahoma tax law. *See* Plaintiff's Brief in Support of Objection to Motion to Dismiss, at 2-3. The sovereign immunity issue and any contrary allegations of waiver logically arise only in the context of a defense to the plaintiff's state-law cause of action and, consequently, are outside the scope of a well-pleaded complaint.[3]

As one commentator observed, "[t]he most important of the justifications for tribal immunity is the need to protect tribal assets." *Tribal Immunity, supra*, at 1073. By initiating its declaratory judgment action, the plaintiff imposed needless costs on the Indian defendants. To be sure, in imposing Rule 11 sanctions, courts must be wary of chilling the creativity of counsel "that is the very lifeblood of the law." *Eastway Construc. Corp.*, 762 F.2d at 254. However, before undertaking its challenge, based on the *National Farmers* decision, to the well-established doctrine of tribal immunity, it was incumbent upon the plaintiff to reasonably inquire into the presence of the

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[3] As for the importance of the federal-question predicate in the *National Farmers* decision, the Court noted that: "it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It was, however, necessary to assert a claim 'arising under' federal law." 105 S.Ct. at 2451.

jurisdictional predicate for its argument, a federal question. Thus, the Court grants the defendants' application for costs and attorney's fees. The defendants are directed to submit their bills of costs and documented applications for reasonable attorney's fees no later than Jan. 19, 1989.

It is so ordered this 4th day of January, 1989.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX G

OPINION NO. 82-22

The Honorable Lonnie L. Abbott September 23, 1982
State Representative

The Attorney General has received your request for an official opinion in which you ask, in effect, the following question:

> Is the Chickasaw Indian Tribe an "employer" required by 85 O.S. 1981, § 2b or § 11, to carry Workers' Compensation Insurance on its employees?

The provisions of 83 O.S. 1981, § 11 require all "employers" in the State of Oklahoma to carry Workers' Compensation Insurance upon their employees in one of a number of delineated manners. The term "employer", as it is used in the Workers' Compensation Act, 85 O.S. 1981, § 1 et seq., is defined in Section 3(3) of the Act, which provides:

> "(3) 'Employer', except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term 'employee' as herein defined."

In addition to this definitional list of "employers" affected by this Act, Title 85 O.S. 1981, § 2b also requires certain subdivisions and political entities of the State to

carry Workers' Compensation Insurance. Section 2b provides, in pertinent part:

> "All departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, shall carry Workers' Compensation Insurance on each employee, whether engaged in a governmental or proprietary function. . . ."

Resolution of your question is dependent upon a determination of the status of the Chickasaw Indian Tribe and whether or not the Tribe is a private or public employer covered by the terms of these provisions. It has long been established that Indian tribes are not subdivisions of any state, but, rather, are "domestic, dependent nations" independent of any state government. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., N.S. Okl. 1971); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir., E.D. Okl. 1951); *Bell v. Phillips Petroleum Co.*, Okl., 641 P.2d 1115, 1119, n.13 (1982). The Chickasaw Indian Nation, in particular, has been so identified as a domestic, dependent nation. *See Choctaw Nation and Chickasaw Nation v. Atchison, T. & S. F. Ry. Co.*, 396 F.2d 578, 581 (10th Cir., E.D. Okl. 1968).

From the above-cited authority, it is evident that the Chickasaw Indian Nation is neither a private entity nor a department, instrumentality or institution of the State or any subdivision thereof. The list of enumerated entities who are subject to the Workers' Compensation Act's provisions outlined in 85 O.S.1981, § 3(3), above, makes no mention of Indian Nations. Similarly, the language of 85 O.S.1981, § 2b, above, dealing with entitles who employ

public employees does not purport to include Indian Nations within it terms. Further, while the term "person" may, in some instances, be construed to include governmental entities, *see generally* 32 WORDS AND PHRASES, "Person" (Perm. Ed. and Supp. 1982), the generally accepted rule is that, absent evidence of a manifest intent by the legislative branch to include governmental entities as "persons" affected by statutory direction, such governmental entities are not so affected. *Id. See also, Cocco v. Maryland Comm. on Medical Discipline,* 39 Md.App. 170, 384 A.2d 766 (1978); *Towner v. Jimerson,* 67 A.D. 2d 817, 413 N.Y.S. 2d 56, 58 (N.Y. App. Div. 1979); *City of Charleston v. Southeastern Const. Co.,* 134 W.Va. 666, 64 S.Ed.2d 676, 682 (1951). A fundamental rule of statutory construction is that to include by specific identification one thing in a description and not to include another is to exclude that latter from the purview of the statute. *Spiers v. Magnolia Pet. Co.,* 206 Okl. 510, 244 P.2d 852 (1952); *State v. Cline,* Okl.Cr., 322 P.2d 208 (1958). While the Workers' Compensation Act will receive a liberal construction in favor of those for whose protection it was enacted, its purview may not be extended beyond the classes actually embraced within its terms. *Snyder Const. Co. v. White, Okl.,* 383 P.2d 674 (1963).

It is, therefore, the official opinion of the Attorney General that your question be answered as follows:

The Chickasaw Indian Tribe is not an "employer" required by 85 O.S.1981. §§ 2b or 11, to carry Workers' Compensation Insurance on its employees.

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma
MICHAEL SCOTT FERN
Assistant Attorney General

No. 89-1322

In the Supreme Court of the United States

OCTOBER TERM, 1990

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a counterclaim for declaratory and injunctive relief asserted by petitioner Oklahoma Tax Commission against the respondent Citizen Band Potawatomi Indian Tribe is barred by tribal sovereign immunity.

2. Whether the holdings in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), that a State may tax the purchase of cigarettes by non-Indians at a store owned and operated by Indians on an Indian Reservation are inapplicable in Oklahoma because Oklahoma has not acquired jurisdiction over Indian country pursuant to Public Law 280, Pub. L. No. 83-280, 67 Stat. 588, as amended.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent is a federally recognized Indian Tribe and is organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503. In 1867, a 30-square-mile reservation was established by Treaty for the Tribe in Oklahoma. Treaty of Feb. 27, 1867, United States-Pottawatomie Tribe, 15 Stat. 531. Under an 1890 Agreement, portions of the reservation were allotted to tribal members and the Tribe ceded the remainder to the United States. Act of Mar. 3, 1891, § 8, 26 Stat. 1016. The ceded lands were then opened to non-Indian settlement. Pet. App. A12-A13.

The 1890 Agreement provided that certain of the ceded lands would be retained by the United States as long as they were needed for Indian purposes. 26 Stat. 1017. Several such tracts, totalling approximately 280 acres, were conveyed by Congress to the Tribe

in 1960 and 1964. Act of Sept. 13, 1960, 74 Stat. 903; Act of Aug. 11, 1964, 78 Stat. 392. In 1976, the land was conveyed back to the United States, to be held in trust for the Tribe, so that it would qualify for federal loans and grants to develop the land for industrial or commercial purposes. Act of Jan. 2, 1975, 88 Stat. 1922; see S. Rep. No. 877, 93d Cong., 2d Sess. 2, 4 (1974); H.R. Rep. No. 1586, 93d Cong., 2d Sess. 2, 4 (1974). A convenience store subsequently was constructed on a portion of the land with federal funds administered by the Department of Housing and Urban Development. Pet. App. A13-A14.

2. Oklahoma levies an excise tax on cigarettes at a total rate of $2.30 per carton. Pet. 3; Okla. Stat. Ann. tit. 68 §§ 302 to 302-3 (Supp. 1990). The "impact of the tax" is expressly "declared to be on the vendee, user, consumer, or possessor of cigarettes," and when the tax is paid by another person, "such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user." § 302. The tax must "be evidenced by stamps which shall be furnished by and purchased from the Tax Commission," *ibid.*, and the retailer must affix the stamps if the wholesaler has not done so. § 305(c)(1966). Oklahoma also levies a 4% sales tax on the sale of tangible personal property, including cigarettes. § 1354(1)(A). The sales tax "shall be paid by the consumer or user to the vendor," and the vendor must "collect from the consumer or user the full amount of the tax" and pay it to the Commission. §§ 1361(A), 1362(A).

If a taxpayer fails to pay either tax, the Commission must determine and assess the amount due. The recipient may protest the assessment within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final, subject to review by the Oklahoma Supreme Court. When the assessment is filed with the court clerk, it has the same effect and may be executed in the same manner as the final judgment of a state court, and it constitutes a lien on any real estate of the taxpayer in the county. Okla. Stat. Ann. tit. 68 § 221 (Supp. 1990).

3. a. The Tribe sells cigarettes at its store without affixing the tax stamps required by state law and without collecting state

sales and excise taxes from either Indian or non-Indian customers. Pet. App. A17-A18. In February 1987, the Commission issued an assessment to the Chairman of the Tribal Business Committee for excise taxes allegedly due on sales of more than 6 million packs of cigarettes sold at the Tribe's store between December 1, 1982, and September 30, 1986. The amount of tax due was $1,108,413.90, and the assessment was for twice that amount, as provided by Okla Stat. Ann. tit. 68 § 305(c) (1966), plus interest and penalties, for a total of $2,691,470.70. Br. in Opp. App. A24-A26. The assessment rendered the Chairman personally liable for the entire amount due. Pet. App. A2.

The Tribe immediately instituted his action for an injunction barring the Commission and its agents "from entering [the Tribe's] Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against [the Tribe], [the Tribe's] officers, agents or employees." Br. in Opp. App. A6-A7. The Tribe stressed that it "ha[d] submitted itself to [the] Court's jurisdiction for the sole purpose of litigating the single issue of the state's jurisdiction to assess back taxes through the state administrative and legal process." Pltf. Opening Br. 7.

b. Soon after the suit was filed, the Commission withdrew its assessment against the Chairman and issued a new assessment for the same amount against the Tribe. Pet. App. A2, A23-A24. The Commission then filed a counterclaim against the Tribe pursuant to Fed. R. Civ. P. 13(a). It alleged that the Tribe's sale of cigarettes to the general public without payment of state taxes was inconsistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), which sustained the application of state taxes to non-Indian purchasers of cigarettes from Indian retailers on a Reservation. Br. in Opp. App. B5-B6. The Commission sought a declaratory judgment sustaining its right to tax the Tribe's sales and enforce its tax laws by assessments and injunctions, and an injunction barring the Tribe from selling cigarettes upon which

the state excise and sales taxes have not been collected and remitted. *Id.* at B6.

The Tribe moved to dismiss the counterclaim, arguing, inter alia, that it is barred by tribal sovereign immunity. The district court rejected the Tribe's sovereign immunity defense, on the ground that the "relief sought by the [Commission] is so intertwined with the relief sought by the [Tribe] that the counterclaim falls within the scope of waiver contained in the [Tribe's] complaint." Br. in Opp. App. C3. The court found this result analogous to the doctrine of equitable recoupment, under which a defendant may offset against the plaintiff's monetary claim an amount that the defendant would otherwise be barred from recovering. *Id.* at C3-C4; see also Pet. App. A21-A22.

c. In its final judgment and opinion, Pet. App. A9-A22, the district court first held that the land on which the tribal store is located is a reservation, and therefore "Indian country" under 18 U.S.C. 1151(a). The court reasoned that a formal designation of Indian lands as a "reservation" is not required and that it is sufficient if Congress intended to reserve the lands for a tribe and vest primary jurisdiction in the federal and tribal governments. The court found that test satisfied here, since the United States holds the land in trust in order to foster tribal economic development. Pet. App. A15-A16. The court therefore concluded that this case falls under the usual rules governing the application of state law on Indian reservations: although a State may " 'under certain circumstances' " assert authority over the activities of nonmembers on a reservation and in " 'exceptional circumstances' " may even assert jurisdiction over the activities of tribal members, "a per se rule has nevertheless been adopted with regard to taxation of on-reservation activities of tribal members." *Id.* at A18 (quoting *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 & n.17 (1987)).

Applying these principles, the court held that "the Tribe itself not only is exempt from payment of state sales tax[1] (such exemption is recognized and acknowledged by the defendants in

[1] We understand this and other references in the district court's opinions and orders to "sales" taxes to include the cigarette excise tax as well.

pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe." Pet. App. A19. The court similarly held that "purchasers of cigarettes at the tribal store who are [tribal] members are exempt from payment of state sales tax." *Ibid.* (citing *Moe*, 425 U.S. at 480-481). On the other hand, because it found the legal incidence of the tax is on the purchaser, Pet. App. A18, the court held that under *Moe* and *Colville*, sales to nonmembers may be taxed and the State may impose on the Tribe an obligation to assist in collecting those taxes and to comply with state record-keeping requirements. *Id.* at A19-A21. The court entered declaratory relief, presumably on respondents' counterclaim, embodying the foregoing principles. *Id.* at A9-A10.

On the Tribe's claim for injunctive relief, the court ordered that "[the Commission and its agents] are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]" and "from collecting any state sales taxes on purchases by members of [the Tribe] at the Potawatomi Tribal Store." Pet. App. A10. However, the court denied "the [Tribe's] request for further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." *Ibid.*

4. a. The court of appeals agreed with the Tribe's argument on appeal (C.A. Br. i, 10-20) that the Commission's counterclaim for declaratory relief is barred by sovereign immunity. Pet. App. A2-A5. It therefore did not reach the Tribe's alternative argument (C.A. Br. i, 20-36; Reply Br. 15-20) that the district court erred in declaring that the Tribe must aid the State in collecting state taxes on purchases of nonmembers. The court explained that "Indian tribes have sovereign immunity from suits to which they do not consent, subject to plenary control [by] Congress," and that "[t]he Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff." Pet. App. A2 (citing *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940)). It also held that the compulsory counterclaim requirement of Fed. R. Civ. P. 13(a) "cannot be viewed as a congressional waiver of the Tribe's im-

munity," because Rule 13(a) "is explicitly intended to require joinder of only those claims that might otherwise be brought separately." Pet. App. A4. Finally, the court rejected the district court's "recoupment" rationale for allowing the counterclaim, reasoning that recoupment is an equitable defense to a suit for money damages, and cannot in any event be used to obtain affirmative relief. *Ibid.*

b. On its appeal, the Commission challenged the injunction barring it from assessing taxes against or collecting taxes from the Tribe itself, and from collecting any taxes on purchases by tribal members. C.A. Br. 52-59. The court of appeals first agreed with the district court that the tract on which the tribal store is located is a "reservation," and therefore "Indian country," since it is within the boundaries of the Tribe's original reservation and is held by the United States in trust for the Tribe. Pet. App. A5-A6. Because the Tribe therefore "retain[s] sovereign powers" over the land, the court believed that "Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." *Id.* at A7. The court found such authority lacking here. It distinguished this Court's decision in *Colville*, which sustained a State's power to tax on-reservation purchases by non-Indians, on the ground that the Tribe in *Colville* "had opted to come under state jurisdiction pursuant to [Public Law 280],"[2] while Oklahoma has not assumed jurisdiction under Public Law 280. *Ibid.* The court therefore held that "the district court improperly denied the [Tribe's] request to enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes," and it remanded for entry of a permanent injunction to that effect even though the Tribe apparently had not challenged the district court's refusal to enjoin the Commission from collecting state taxes on sales to nonmembers. *Ibid.*

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[2] Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.

DISCUSSION

This case has a confused procedural history, and it is not clear precisely what relief the Tribe requested and the court of appeals and district court granted. The question whether the Court should grant review is further complicated by the wide-ranging nature of the Commission's submission, which mixes together *substantive* issues concerning the Tribe's governmental authority and its asserted exemption from state tax laws on the one hand, and *procedural* issues concerning the Tribe's sovereign immunity to suit and other enforcement measures the State might take to ensure collection of its taxes on the other hand. See Pet. 11-17.

In these circumstances, we think it best to focus on the two principal legal issues the court of appeals actually decided. First, the court held that the Commission's state-law counterclaim for declaratory relief is barred by tribal sovereign immunity. That ruling is correct, is consistent with (indeed compelled by) a number of decisions of this Court, and does not conflict with any decision of another court of appeals. It therefore does not warrant review by this Court.

Second, the court held that the Tribe is entitled to seemingly broad injunctive relief barring the Commission from collecting state taxes on *any* of its sales of cigarettes, whether to Indians or non-Indians. The court distinguished *Colville*, which sustained a state tax on sales to nonmembers, solely on the ground that the State there had acquired jurisdiction over the reservation under Public Law 280, while in this case Oklahoma has not done so. This attempted distinction of *Colville* is clearly wrong. We do not believe, however, that this issue warrants plenary review. Rather, we suggest that the Court grant the certiorari petition insofar as it challenges the portion of the judgment that addresses the Tribe's claim for injunctive relief, summarily vacate that portion of the judgment because it is premised on the court's erroneous view of *Colville*, and remand for further proceedings on the question of injunctive relief.

1. The court of appeals correctly held that the Commission's counterclaim is barred by the Tribe's sovereign immunity. See Pet. App. A3-A5. As this Court stated in *Santa Clara Pueblo*

v. *Martinez*, 436 U.S. 49, 58 (1978): "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977)." See also *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1067 (1st Cir. 1979). The Court reaffirmed this rule in *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986), holding that a State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of its sovereign immunity to all civil causes of action, because such a condition would "invite[ ] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 890-891.

The immunity of Indian Tribes to suit finds its roots in the status of the Tribes as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which even today exercise inherent sovereign authority over their members and territory. See *Duro* v. *Reina*, 110 S. Ct. 2053, 2060-2061 (1990); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes II*, 476 U.S. at 890; see also *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n.10; *United States* v. *Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). This immunity now also finds strong support in Congress's statutory policy of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). If Indian Tribes were exposed to suits without their consent, scarce tribal resources would be devoted to litigation and be exposed to adverse money judgments that could deprive the Tribe of its ability to furnish necessary services to its members. Cf. *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67 (discussing financial impact on Tribes that would result from

implied rights of action against tribal officers under Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*).[3]

"This [immunity] aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," and Congress therefore may authorize suits against Indian Tribes. *Santa Clara Pueblo*, 436 U.S. at 58. But any such waiver of the Tribe's sovereign immunity by Congress may not be implied; it must be unequivocally expressed. *Ibid.* The Commission does not suggest that Congress has enacted a law authorizing it to sue the Tribe for the amount of taxes allegedly due on past transactions or for declaratory and injunctive relief regarding the application of the State's tax laws. Moreover, although we may assume that a Tribe may waive its sovereign immunity to suit if the requisite consent is clearly stated,[4] the Commission points to no such waiver here.

Nor is the bar of sovereign immunity lifted because the Commission here sought relief in a counterclaim under Fed. R. Civ. P. 13(a), rather than in a direct action against the Tribe. The Commission does not suggest that the Tribe *intended* its initiation of the suit to constitute consent to the Commission's broad counterclaims.[5] There likewise is no basis for concluding that the filing of the suit abrogated the Tribe's sovereign immunity by operation of law.[6] In *U.S. Fidelity & Guaranty Co.*, this Court

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[3] See *Adams* v. *Murphy*, 165 F. 304, 308-309 (8th Cir. 1908) (exemption of Indian tribes from civil suit "has been the settled doctrine of the government from the beginning"; "[i]f any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments."). Accord *Thebo* v. *Choctaw Tribe*, 66 F. at 376.

[4] See, *e.g.*, *Puyallup Tribe* v. *Washington Game Dep't*, 433 U.S. 165, 170 (1977); *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *McClendon* v. *United States*, 885 F.2d 627, 630-631 (9th Cir. 1989); *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982); *United States* v. *Oregon*, 657 F.2d at 1015.

[5] See Br. in Opp. App. A2 (complaint) ("Plaintiff submits to this Court's jurisdiction for the limited purpose of securing the equitable relief prayed for herein."). Compare *United States* v. *Oregon*, 657 F.2d at 1015; *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 772-773 (D.C. Cir. 1986).

[6] Fed. R. Civ. P. 13 does not purport to dispense with a Tribe's sovereign immunity. See Advisory Committee Note 5 to Rule 13 (counterclaim pro-

held that sovereign immunity barred a cross-claim against a Tribe, because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.[7] Other courts, like the court below, Pet. App. A3-A4, have adhered to this rule in the specific context of a counterclaim filed in response to an action brought by a Tribe to prevent application of state taxes to on-reservation sales of cigarettes. See *Chemehuevi Indian Tribe* v. *California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (quoted at Pet. App. A4), rev'd on other grounds, 474 U.S. 9 (1986); *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).[8]

The Commission does not challenge the Tenth Circuit's holding that its counterclaim for declaratory and injunctive relief is barred

visions subject to admonition in Fed. R. Civ. P. 82 that Rules not be construed to extend district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore cannot overcome tribal immunity. See 28 U.S.C. 2072(b) (rules "shall not abridge, enlarge or modify any substantive right").

[7] Contrary to the Commission's contention (Pet. 12-13), tribal sovereign immunity was central to the Court's holding in *U.S. Fidelity & Guaranty Co.* The Court took note of "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent," and the Court found the claim barred because "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512.

[8] The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. See Pet. App. A4. Equitable recoupment is a defense to a suit for monetary relief that permits the defendant to offset the award in favor of the plaintiff by an amount the plaintiff owes to the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. See *United States* v. *Dalm*, 110 S. Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n.6, (citing *Bull* v. *United States*, 295 U.S. 247 (1935)). In *Three Affiliated Tribes II*, the Court noted the Tribe's concession that the non-Indian defendant could assert a counterclaim arising out of the same transaction as a setoff or recoupment, but it declined to consider whether a counterclaim might also be used to fix the Tribe's affirmative liability. 476 U.S. at 891 & n.*.

if the same claim would be barred in a separate suit against the Tribe. Nor does the Commission argue that the Tenth Circuit's holding that its claim against the Tribe would be barred by tribal sovereign immunity in a separate action conflicts with this Court's precedents or with any decision of another court of appeals.[9] Review therefore is not warranted on the sovereign immunity issue.

Apparently recognizing that its counterclaim is barred under existing law, the Commission argues (Pet. 12, 16-17) that the Court should reconsider the doctrine of tribal sovereign immunity. As we have explained, however, the Court has repeatedly held that an Indian Tribe is absolutely immune from suit without its consent unless Congress dispenses with that immunity. Although Congress has occasionally authorized particular categories of suits against Tribes where it believed the public interest so required,[10]

[9] In a decision not cited by the Commission or the panel below, the Tenth Circuit previously held that the Indian Civil Rights Act dispensed with a Tribe's sovereign immunity to a damages action brought by a nonmember. *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). However, as we explain in our amicus brief (at 13-14) in response to the Court's invitation in *Puckett* v. *Native Village of Tyonek*, petition for cert. pending, No. 89-609, this ruling in *Dry Creek Lodge* was clearly incorrect and has been sharply limited by the Tenth Circuit in subsequent decisions. Our amicus brief in *Tyonek* therefore argues that the asserted conflict between the Ninth Circuit's decision in that case and the Tenth Circuit's decision in *Dry Creek Lodge* does not warrant a grant of certiorari in *Tyonek*. (We have furnished counsel for the parties in this case with a copy of our brief in *Tyonek*.) It follows *a fortiori* that *Dry Creek Lodge* does not warrant a grant of certiorari in this case, since any inconsistency between the two would represent only an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Moreover, this case arises under state law, not the Indian Civil Rights Act, and the *Dry Creek Lodge* panel's belief that Congress must have intended to afford a remedy for violations of that Act has no application here.

[10] *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *United States* v. *Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of Mar. 3, 1891, ch. 538, 26 Stat. 851); see generally *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1; R. Strickland, *et al.*, *Felix S. Cohen's Handbook of Federal Indian Law* 324 (1982) [hereinafter *1982 Cohen*]. Cf. 25 U.S.C. 450f(c) (requiring carrier insuring Tribe under Indian Self-Determination Act to "waive any right it may have to raise as a defense the [tribe's] sovereign immunity * * * from suit").

it has not enacted any general abrogation of tribal sovereign immunity. To the contrary, in the Indian Self-Determination Act, which establishes the framework for federal financial support of tribal governments in furtherance of the goals of tribal economic independence and self-government, Congress expressly provided that nothing in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n.[11] Because Congress thus has endorsed and acted upon the long-established principle that Indian Tribes are immune from suit, there is no occasion for this Court to reexamine its own precedents affirming that principle.

This case would not in any event present a suitable occasion for reexamination of tribal sovereign immunity. The Commission does not invoke any rights conferred on it by an Act of Congress. Compare *Santa Clara Pueblo*, *supra*. Its counterclaim arises under *state* law.[12] In light of the Court's repeated holdings that

[11] In the Indian Reorganization Act, Congress authorized Tribes both to adopt a constitution for the conduct of their governments (§ 16, 25 U.S.C. 476) and to receive a separate charter of incorporation to enable them to engage in business activities through a separate entity (§ 17, 25 U.S.C. 477). The principal reason for the latter authorization was the concern that non-Indian entities would not enter into commercial dealings with the tribal government because of its tribal immunity. Charters issued under Section 17 of the IRA often contain a clause allowing the corporation to sue or be sued, but this waiver is limited to the business dealings and assets under the control of that corporation, and is not intended to extend to the Tribe's activities in its sovereign capacity, as organized under Section 16 of the IRA. See *1982 Cohen* 325-326.

[12] In *Oklahoma Tax Comm'n* v. *Graham*, 109 S. Ct. 1519 (1989), the Court held that the Commission's suit against the Chickasaw Nation and the manager of a tribal enterprise to collect unpaid state cigarette taxes was one arising under state, not federal law, and therefore could not be removed to federal district court. After the *Graham* case was remanded back to the state courts following this Court's jurisdictional ruling, the trial court dismissed the case, finding it barred by tribal sovereign immunity. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, No. C-85-223 (Dist. Ct. Murray Cty July 18, 1989). The Commission's appeal of that dismissal has been briefed and is pending before the Oklahoma Supreme Court (No. 73,729).

In *Oklahoma ex rel. May* v. *Seneca-Cayuga Tribe*, 711 P.2d 77, 83-84 (1985), cited by the Commission (Pet. 10-11), the Oklahoma Supreme Court held that

only Congress may dispense with a Tribe's sovereign immunity, the Court should not undertake to do so itself where Congress has not even enacted a substantive rule of conduct to which the abrogation of sovereign immunity from suit might be tied. See *Three Affiliated Tribes II*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States").[13]

2. Although the court of appeals correctly ordered dismissal of the Commission's counterclaim, its treatment of the Tribe's request for injunctive relief was clearly wrong. The proceedings in the courts below on this issue are somewhat confused. As we have pointed out (see page 3, *supra*), the Tribe's claim for injunctive relief appears initially to have been limited to preventing the Commission and its agents from assessing *past* taxes

sovereign immunity did not bar a declaratory judgment action by the State against a tribe concerning the legality of its bingo operations. However, that Court erroneously relied on the balancing approach applied by this Court in determining whether state law or jurisdiction may extend to reservation activities, rather than the absolute rule, consistently followed by this Court, that the tribe itself is immune from suit. The Tenth Circuit subsquently affirmed a preliminary injunction barring further state-court proceedings in *Seneca-Cayuga*, in part because of the Oklahoma Supreme Court's clear error on the sovereign immunity issue. *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 714-716 (10th Cir. 1989).

In its brief on the Commission's appeal in the *Graham* case, *supra*, the Chickasaw Nation argues (as the state trial court held) that the Oklahoma Supreme Court should not follow its *Seneca-Cayuga* decision in light of this Court's intervening decision in *Three Affiliated Tribes II*, which makes clear that an Indian Tribe is immune from suit in state court absent federal authorization. 476 U.S. at 890-891. Especially in view of the pending appeal in the *Graham* case, the Oklahoma Supreme Court's prior decision in *Seneca-Cayuga* does not warrant a grant of certiorari on the sovereign immunity issue in this case.

[13] The Commission relies (Pet. 16-17) on *Santa Clara Pueblo* for the proposition that immunity might be limited to suits involving "internal" tribal affairs. But one of the plaintiffs who challenged the Tribe's membership policy in that case was a nonmember child. Nonmember claimants also were involved in *U.S. Fidelity & Guaranty Co.*, *Puyallup* and *Three Affiliated Tribes II*. Moreover, contrary to the Commission's contention (Pet. 16), the immunity of the Tribe in *Puyallup* extended to off-reservation fishing rights. See 433 U.S. at 167, 171; see also note 16, *infra*.

against the Tribe itself and taking steps to enforce that assessment. See also Br. in Opp. 5-6. The district court's judgment, however, not only granted that relief; it also enjoined the Commission "from collecting any state sales taxes on purchases by members of the [Tribe]" and, in light of *Colville*, denied the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." Pet. App. A10. The latter portions of the judgment seem to be concerned with collection of state taxes on future as well as past sales.

What is more, although the Tribe, on appeal, apparently did not challenge the denial of injunctive relief barring collection of taxes on sales to nonmembers, the court of appeals proceeded to decide that question: it held that "Oklahoma has no authority to tax the store's transactions," distinguishing *Colville* (which sustained the State's right to tax purchases by nonmembers) on the ground that Oklahoma, unlike the State of Washington in *Colville*, has not assumed jurisdiction under Public Law 280. Pet. App. A7. The court therefore concluded that the district court improperly denied the Tribe's "request" to "enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes" (presumably including future sales to nonmembers), and it remanded for entry of such an injunction. *Ibid.*

Whether or not the district court was correct in believing that the Tribe had "request[ed]" injunctive relief barring collection of state taxes on purchases by nonmembers, there is substantial reason to doubt that the court of appeals had that question before it. But contrary to the Tribe's suggestion (Br. in Opp. 8), we do not believe the court of appeals' discussion of *Colville* can be dismissed as "dicta" and "not dispositive in reversing the district court." As we read the opinion below, the court of appeals did reach the merits of this issue (whether or not it should have done so), and its discussion of *Colville* was an essential and indeed the *only* basis on which the court of appeals reversed the district court's refusal to award broader injunctive relief.[14] On this point, the court below was plainly mistaken.

[14] The new final judgment entered by the district court on remand on January 4, 1990, further confuses the procedural posture of the case. See Br. in Opp. App. D1-D10. That judgment appears to incorporate in its conclusions of law the court of appeals' ruling that Oklahoma's failure to assume jurisdiction under Public Law 280 renders *Colville* inapplicable here. *Id.* at D7-D8. But as relief, the judgment only enjoins the Commission "from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]," "entering the Tribe's Indian Country," and "enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe, the Tribe's officers, agents or employees." *Id.* at D10. It does not in terms enjoin future collection of taxes on purchases by nonmembers where the Commission does not resort to such measures against the Tribe. However, if the court of appeals' judgment were permitted to stand, the Tribe might rely on that judgment in seeking broader relief in this or some other case.

This Court has thrice held—in *Moe*, *Colville* and *Chemehuevi*—that where the legal incidence of a state cigarette tax is on the purchaser, a State may impose that tax on purchases by nonmembers from a tribal store on an Indian reservation and may require the Tribe to collect the tax on its behalf. 425 U.S. at 481-483; 447 U.S. at 151, 159; 474 U.S. at 11-12. The district court in this case held that the legal incidence of the state tax is on the customer. Pet. App. A18. Neither the court of appeals nor the Tribe has questioned that ruling, which in any event seems compelled by the text of the Oklahoma statutes (quoted at page 2, *supra*). *Moe*, *Colville* and *Chemehuevi* therefore are controlling here and permit Oklahoma to impose its tax on cigarette purchases by nonmembers and to obligate the Tribe to collect the tax on its behalf.

It is true that the particular reservations involved in *Moe*, *Colville* and *Chemehuevi* had been brought under the civil jurisdiction of the State pursuant to Public Law 280. But contrary to the court of appeals' assertion, in none of the three cases (including *Colville*) did the Court's holding depend on that fact. And with good reason. Public Law 280 permits a State to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, and provides that the "civil laws" of the State that are of general application to private persons and property shall then apply in Indian country. 25 U.S.C. 1322(a), 28 U.S.C. 1360(a). In *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), the Court held that these provisions of Public Law 280 only permit state courts to adjudicate disputes involving Indians and to apply state

law in deciding such cases, and do not confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. See also *Rice* v. *Rehner*, 463 U.S. 713, 734 n.18 (1983) (civil jurisdiction conferred on a State by Public Law 280 "does not include regulatory jurisdiction to tax"); *Cabazon*, 480 U.S. at 208, 210 n.8 (same).

Indeed, the Tribe's notion (Br. in Opp. 8) that the ruling in *Colville* may be explained by Public Law 280 is refuted by the discussion of *Bryan* v. *Itasca County* in *Colville* itself (447 U.S. at 142 n.8):

> Initially the State [of Washington] asserted [in the district court] that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservation Indians. After this theory was rejected in *Bryan* v. *Itasca County*, *supra*, the State abandoned any claim of authority to tax sales to tribal members. 446 F. Supp., at 1346, n. 4.

In light of the Court's acceptance of Washington's concession, there simply is no basis for contending that the same grant of civil jurisdiction under Public Law 280 was the essential (yet unspoken) basis for the Court's holding that the State could tax *nonmembers*.

Moreover, in *Moe*, Montana's assumption of civil jurisdiction over the Flathead Reservation under Public Law 280 was limited to particular subject matters, and the district court had held that "the power to impose cigarette and licensing taxes is *not* among the categories of assumed civil jurisdiction." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1306 (D. Mont. 1975) (three-judge court) (emphasis added). Public Law 280 therefore could not have been the basis for this Court's holding that Montana could tax sales to nonmembers. See also *Cotton Petroleum Corp.* v. *New Mexico*, 110 S. Ct. 1698 (1989) (sustaining application of state tax to on-reservation activities of non-Indian in New Mexico, which has not assumed jurisdiction under Public Law 280).

Because the States' authority to tax cigarette purchases by nonmembers in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to—but rather existed independently of—Public Law 280, it follows that Oklahoma's power to tax cigarette purchases by nonmembers at the Tribe's store likewise exists independently of Public Law 280 and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power. In our view, the court of appeals' contrary conclusion on this issue is so clearly wrong that a summary disposition would be appropriate. We accordingly suggest that the Court grant the petition, summarily vacate the portion of the judgment below that addresses the Tribe's request for injunctive relief because it rests on the court of appeals' erroneous view of *Colville* (and *Moe* and *Chemehuevi*), and remand to the court of appeals for further consideration on the question of injunctive relief. The Court disposed of the petition in *Chemehuevi* in the same manner: the Court there summarily reversed the Ninth Circuit's holding that the State could not tax nonmembers, but it did not grant review of the Ninth Circuit's holding that the State's counterclaim was barred by tribal sovereign immunity. See 474 U.S. at 10, 12; 85-130 Pet. at i, 8-10.

If the Court disposes of the petition in the manner we suggest, it will furnish an opportunity for the court of appeals to clarify what other issues were presented and preserved below. Moreover, because the court of appeals held that all transactions at the Tribe's store are exempt from state taxation, it had no occasion to consider what measures the Commission might lawfully take to enforce its tax laws if those laws *do* apply to at least some sales of cigarettes (those to nonmembers). Nor is it clear what enforcement measures the State would propose to take. The court of appeals should be given an opportunity to address these matters in the first instance. Compare *Colville*, 447 U.S. at 162 (declining to consider legality of possible enforcement measures). Indeed, because a summary disposition by this Court would disabuse the Tribe of the notion that the rule of *Moe*, *Colville* and *Chemehuevi* is inapplicable to cigarette sales at its store, the Tribe might be given a reasonable opportunity, following a remand, to assume its obligation to assist the Commission in col-

lecting state excise taxes on sales to nonmembers. If the Tribe does so, the matter of future enforcement measures need never be addressed.[15]

[15] The Commission also contends (Pet. 8-9) that cigarette sales at the tribal store (apparently including even those to tribal members) are subject to taxation because the tribal trust land on which the store is located is not the sort of land to which the usual rules of state and tribal jurisdiction under *Colville* and similar cases apply. Contrary to the Commission's view, the court of appeals' holding on this point is a reasonable application of the Court's description of a reservation in *United States* v. *John*, 437 U.S. 634, 649 (1978), as land that has "been validly set apart for the use of the Indians as such, under the superintendence of the Government." See Pet. App. A5-A6. The Court denied review in another case in which the Oklahoma Tax Commission challenged an essentially identical ruling by the Tenth Circuit regarding tribal property in Oklahoma. See *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 973 (1987), cert. denied, 487 U.S. 1218 (1988). Because the panel below followed *Indian Country, U.S.A.*, there is no reason for a different result here. See also 25 U.S.C. 2719(a)(2) (applying Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, which was enacted after the denial of certiorari in *Indian Country, U.S.A.*, to Indian lands in Oklahoma).

Because this issue is essentially confined to Oklahoma (in light of the unique history of its reservations), it also is significant that the Tenth Circuit's decisions are consistent with decisions of the Oklahoma Supreme Court in somewhat analogous circumstances. See *Seneca-Cayuga*, 711 P.2d at 79-83; *Enterprise Management Consultants, Inc.* v. *Oklahoma Tax Comm'n*, 768 P.2d 359, 363 n.16 (1988) (bingo on Potawatomi tribal land); *id.* at 366 (Kauger, J., concurring); *Housing Auth.* v. *Harjo*, 790 P.2d 1098 (Okla. 1990). (However, for the reasons stated in our amicus brief in support of the certiorari petition in *Oklahoma* v. *Brooks*, cert. denied, 109 S. Ct. 1769 (1989), we believe that special statutes applicable to the former territories of the Five Civilized Tribes in eastern Oklahoma transferred criminal and civil adjudicatory jurisdiction over Indian Country in those areas to the State.)

CONCLUSION

The petition for a writ of certiorari should be granted insofar as petitioner seeks review of that portion of the judgment of the court of appeals addressing the Tribe's request for injunctive relief, that portion of the judgment should be summarily vacated for the reasons stated in point 2 of this brief, and the case should be remanded to the court of appeals for further consideration of the Tribe's request for injunctive relief. The petition for a writ of certiorari should be denied insofar has it seeks review of the portion of the judgment below that directs dismissal of the Commission's counterclaim on sovereign immunity grounds.

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No. 89-1322

In The

Supreme Court of the United States

October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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QUESTION PRESENTED

Respondent will address the following question:

Whether this Court should summarily reverse and remand this case to the Circuit Court for consideration of what measures the Petitioner might lawfully take to enforce its tax laws because the Respondent or a third party might later rely on the judgment below to seek broader relief than that actually granted.

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Consistent with Sup. Ct. R. 15.7, respondent, The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Tribe"), submits the following supplemental brief because of an intervening matter not available at the time of respondent's last filing, to-wit: the "Brief for the United States As Amicus Curiae" (hereafter "Solicitor's Brief").

DISCUSSION

The Solicitor begins his brief by claiming that this "case has a confused procedural history, and it is not clear precisely what relief the Tribe requested and the Court of Appeals and District Court granted".[1] This sentence is not accurate and from it flows a flawed recommendation by the Solicitor.

As subsequently pointed out in the Solicitor's brief,[2] the precise relief sought by the Tribe was a judgment that permanently "enjoins . . . [petitioner (Oklahoma Tax Commission)] from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff".[3]

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[1] Solicitor's Brief, supra p. 7.

[2] Id. at 15, fn. 14.

[3] See Brief in Opposition to Petition for Writ of Certiorari (hereafter "Opposition Brief"), p. A-7 (Mar. 22, 1990) (complaint for injunctive relief).

The relief granted by the Tenth Circuit is equally clear and precise: "REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis". *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Com'n*, 888 F.2d 1303, 1307, 14 Fed.R.Serv.3d 1491 (10th Cir. Okl. 1989).

Finally, the permanent relief granted[4] by the district court is likewise clear and precise, to-wit: Oklahoma is permanently enjoined "from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe".[5]

Whatever may be confusing about the "procedural history" of this case it is not because the Tribe has been

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[4] The judgment also dismissed the counterclaim and permanently enjoined Oklahoma "from assessing the state sales taxes against and/or collecting any state sales taxes from plaintiff". The question of state "sales taxes" was never raised by the Potawatomis other than to point out that Oklahoma exempts the Potawatomis from paying sales taxes. See e.g. Opposition Brief, supra p. D-8, ¶10. The question of taxing sales by the Potawatomis was raised by Oklahoma's counterclaim. See Opposition Brief, supra p. B-6, ¶E.3. This sentence about sales taxes in the permanent injunction is a verbatim repetition of a sentence in the original judgment which was added, sua sponte, by the district court. See Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, p. A-10 (hereafter "Petition") (Feb. 20, 1990). No party appealed from this portion of the judgment (i.e. claimed that it was error) and thus it was simply repeated when the permanent injunction was entered after remand with no objection from Oklahoma.

[5] Opposition Brief, supra p. D-10 (emphasis added).

imprecise in the relief it sought nor because of any ambiguity in the permanent relief granted by the district or appellate courts. Any "confusion" is the result of a counterclaim wrongly pursued by Oklahoma.[6] Through this counterclaim, Oklahoma sought all kinds of affirmative relief against the Tribe including an order declaring that Oklahoma has jurisdiction to tax Potawatomi sales.[7]

To avoid potential pitfalls from this alleged "confused procedural history", the Solicitor suggests that "it [is] best to focus on the two principal legal issues the Court of Appeals actually decided."[8] First, the Solicitor rightly concludes that the Tenth Circuit was correct in remanding for dismissal of Oklahoma's counterclaim and that such a dismissal is consistent with all decisions by circuit courts and by this Court.[9] The dismissal of the counterclaim was certainly one of the principal issues decided by the Tenth Circuit. The second issue

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[6] For example, the district court apparently felt compelled by its consideration of the counterclaim to enter a judgment that is replete with references to "sales taxes" including an order "(3) that the plaintiff's [Potawatomis'] request for further permanent injunctive relief as to collection of state sales taxes on purchases by non-members of the Citizen Band Potawatomi Indian Tribe of Oklahoma at the Potawatomi Tribal Store, a/k/a The Gallery Trading Post is DENIED." Petition, supra p. A-10. The Potawatomis never asked for such injunctive relief and never discussed collection of state sales taxes on purchases by non-members of the Tribe. These were issues wholly raised by Oklahoma in its counterclaim.

[7] See Opposition Brief, supra p. B-6. All of this affirmative relief was hypothetical because the only actual dispute was Oklahoma's proposed tax assessment.

[8] Id. at 7.

[9] Solicitor's Brief, supra pp. 7-13.

discussed by the Solicitor, however, was not. The Solicitor argues that the Tenth Circuit held "that the Tribe is entitled to **seemingly** broad injunctive relief barring the Commission from collecting state sales taxes on any of its sales of cigarettes, whether to Indians or non-Indians."[10] The Solicitor has wisely used the equivocating adverb "seemingly" because the injunction actually entered, as the Solicitor points out, "does not in terms enjoin future collection of taxes on purchases by non-members where the Commission does not resort to such measures against the Tribe".[11] The Solicitor ignores the central issue, indeed, *the only issue, i.e.*, whether or not Oklahoma can assess an Indian tribe with a cigarette tax.[12]

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[10] Id. (emphasis added).

[11] Solicitor's Brief, supra p. 15, fn. 14.

[12] Although the Solicitor never provides any direct authority for the proposition that Oklahoma can assess a tax against an Indian tribe, he does provide some non-syllogistic reasoning from which one is supposed to infer such authority. For example, the Solicitor argues that: "Because the State's authority to tax cigarette purchases by non-members in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to – but rather existed independently of – Public Law 280, it follows that Oklahoma's power to tax cigarette purchases by non-members at the Tribe's store likewise exists independently of Public Law 280 and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power." Solicitor's Brief, supra p. 17. Again, the Solicitor is begging the question. Where is Oklahoma's authority in Indian Country – or, for that matter, the authority for the states in Moe, Colville and Chemehuevi – which exists independently of Public Law 280? To date, no party has supplied any answer. Public Law 280 may or may not be the jurisdictional basis for the decisions in Moe, Colville and Chemehuevi,

(Continued on following page)

The Solicitor's brief studiously avoids providing any argument or authority for the proposition that Oklahoma was correct in assessing the Tribe with a tax.[13] In fact, the Solicitor overlooks considerable authority to the contrary. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 94 L.Ed.2d 244, 258, fn. 17, 108 S.Ct. 1083 (1987). Instead, the Solicitor discusses an issue (the impact of the *Colville* decision[14] in Oklahoma) which is not relevant because the counterclaim cannot be pursued.[15] The merits of Oklahoma's counterclaim should not be discussed in this petition for writ of certiorari. The merits of the counterclaim are not at issue. What is at issue is whether or not the counterclaim was properly dismissed. If so, the merits of the counterclaim are moot. If, contrary to all

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but some jurisdictional basis must exist because the power to tax extends only as far as the jurisdiction of the tax assessor. Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954); Standard Oil Co. v. People, 291 U.S. 242, 244-45, 54 S.Ct. 381, 78 L.Ed. 775 (1934).

[13] The Solicitor refers to the cigarette tax issue here as a "tax on purchases". Solicitor's Brief, supra p. 15. This reference is not accurate. The proposed tax assessment is not on "purchases", but rather on the Potawatomis. Further, the three cases relied upon by the Solicitor concerned a "tax on purchasers", not a "tax on purchases". See e.g. California v. Chemehuevi Indian Tribe, 106 S.Ct. 289, 290 (1985). None of these cases upheld the direct assessment of a tax against an Indian tribe.

[14] Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980).

[15] Oklahoma's counterclaim is premised on the Colville decision. See Opposition Brief, supra p. B-5 ("That said actions of the plaintiff [Tribe] are in violation of . . . the federal common law as set forth in . . . Washington v. Confederated Tribes of Colville.").

existing authority,[16] the counterclaim should not have been dismissed, the appropriate relief would not be to reverse the injunction but rather to remand this case to the Tenth Circuit for consideration of the merits of the counterclaim. In agreeing that the counterclaim was properly dismissed but arguing that the merits of the counterclaim require reversal, the Solicitor is taking positions which are irreconcilable.

PROPOSITION

A DESIRE FOR ANSWERS TO HYPOTHETICAL QUESTIONS IS NOT A PROPER REASON TO GRANT CERTIORARI FOR THE PURPOSE OF SUMMARILY REVERSING AND REMANDING.

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indian's exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985) (emphasis added). Although the Solicitor – like Oklahoma – does not cite a single authority for the proposition that Oklahoma can lawfully assess a cigarette tax against the Tribe, this lack of authority does not deter the Solicitor from urging this Court to summarily reverse on issues which have not been briefed by the Tribe. The

[16] Sovereign suit immunity is not the only reason why the counterclaim was properly dismissed. See e.g. Opposition Brief, supra pp. 7-8.

Solicitor foresees that the Tenth Circuit opinion might later be misconstrued or might lead to some future errors. The Solicitor's argument for reversal is capsulized in the following quotations:

> [I]f the Court of Appeals judgment is permitted to stand, the Tribe **might** rely on that judgment in seeking broader relief **in this or some other case**.

Solicitor's Brief, *supra* p. 15, fn. 14 (emphasis added).

> If the Court disposes of the petition in the manner we suggest, it will furnish an opportunity for the Court of Appeals to clarify what other issues were presented and preserved below. Moreover, because the Court of Appeals held that all transactions at the Tribe's stores are exempt from state taxation, it had no occasion to consider what measures the Commission might lawfully take to enforce its tax laws if those laws *do* apply to at least some sales of cigarettes (those to non-members). Nor is it clear what enforcement measures the state would propose to take. The Court of Appeals should be given an opportunity to address these matters in the first instance.

Id. at 17 (emphasis in original). This is clearly a call for a remand to the Tenth Circuit solely for the purpose of soliciting a series of advisory opinions. The Court of Appeals "had no occasion to consider what measures the Commission [Oklahoma] might lawfully take to enforce its tax laws", not because the Court of Appeals held that "all transactions at the Tribe's stores are exempt from state taxation", but because – once the counterclaim was dismissed – the only issue before the Tenth Circuit was whether or not the measure actually taken by Oklahoma (tax assessment) was lawful. It may not be clear "what

enforcement measures the State would propose to take" but it is clear what measure Oklahoma actually did take (assess the Tribe with a cigarette tax) and that this measure is patently illegal. *Montana, supra* p. 765.

The Solicitor is asking this Court to take action contrary to the U.S. Constitution which prohibits the exercise of jurisdiction by federal courts except for actual controversies.

> '[I]t is well settled that federal courts may act only in the context of a judiciable case or controversy.' *Benton v. Maryland*, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969). 'Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964).

Securities & Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 577, 579-80 (1972). A petition for writ of certiorari should be granted "only when there are special and important reasons therefor". Sup. Ct. R. 17.1. The Solicitor's call for summary reversal and remand is premised on a desire for the Tenth Circuit to resolve numerous hypothetical questions. This is not a "special" or "important" reason for granting certiorari and is contrary to the constitutional grant of jurisdiction to the federal courts.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 89-1322

In The
Supreme Court of the United States

October Term, 1989

OKLAHOMA TAX COMMISSION,

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v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE OKLAHOMA TAX COMMISSION

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether an Indian tribe may operate a business, open to the general public, selling cigarettes and other items without complying with any applicable State tax law by virtue of the Sovereign Immunity Doctrine.

2. Whether the State may enforce compliance of State tax laws against a tribally-owned business by way of assessment for delinquent taxes against the Indian tribe or by a lawsuit to enjoin the tribal business activity until taxes are properly paid.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Oklahoma Tax Commission, and the respondent, Citizen Band Potawatomi Indian Tribe of Oklahoma. Cindy Rambo, Chairman of the Tax Commission; Robert L. Wadley, Vice-Chairman ofthe Tax Commission; and Don Kilpatrick, Secretary of the Tax Commission, were named in the proceedings below as defendants - appellees/cross appellants in their official capacities as members of the Oklahoma Tax Commission.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE OKLAHOMA TAX COMMISSION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 888 F2d 1303, and is reprinted in the pet. cert. p. A-1.

The Judgment of the United States District court for the Western District of Oklahoma (West, DJ) has not been reported. It is reprinted in the pet. cert. p. A-9. The Order of the District Court is not reported and is reprinted at pet. cert. p. A-12.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(l). The opinion of the Court of Appeals for the Tenth Circuit was entered on November 3, 1989. The Petition for Writ of Certiorari was docketed in this Court on January 29, 1990. The Petition was granted on October 1, 1990.

STATUTES INVOLVED

Title 28 United States Code §1254(l) is set forth in the pet. cert. p. A-26. The Federal jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Plaintiff below is a federally recognized Indian tribe. Title 28 U.S.C. §1362 is set forth in the pet. cert. p. A-25.

STATEMENT OF THE CASE

The Citizen Band Potawatomi Indian Tribe of Oklahoma (Tribe hereafter), a federally recognized Indian tribe, owns and operates a convenience store which is open to the general public and from which the Tribe sells large quantities of cigarettes and other convenience store items. The tribal store is located on a tract of land within Pottawatomie County in Shawnee, Oklahoma, which is held by the United States in trust for the Tribe. The Tribe had acquired the land, containing approximately 280 acres, from the United States in fee, unrestricted as to Indian ownership and taxable under the Act of September 13, 1960, 74 Stat. 903 and the Act of August 11, 1964, 78 Stat. 392. Subsequently, on May 27, 1976, the Tribe conveyed the land to "the United States of America in trust for the Citizen Band of Potawatomi Indians of Oklahoma" pursuant to the Act of January 2, 1975, 88 Stat. 1922.

The Tribe imposes its own cigarette tax by affixing its own tax stamp to the packages of cigarettes sold at the tribal store. The proceeds of the Tribe's cigarette tax and the profits generated by the tribal store finance tribal operations.

Oklahoma law requires all vendors of tangible personal property, including cigarettes, to collect and remit state and local sales taxes (4 3/4% State plus 2% or 3% local) to the Oklahoma Tax Commission (State hereafter), 68 O.S. §1361. In addition, cigarette excise taxes are imposed on the consumer of cigarettes at the rate of $2.30 per carton of 10 packages containing 20 cigarettes each, 68 O.S. §302, 302-1, 302-2, 302-3, 302-4. Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor from the State and affixed to each package of cigarettes sold. If a vendor sells cigarettes without affixing the excise tax stamp, the vendor will be liable to pay the State a sum equal to twice the amount of the tax due, 68 O.S. §305(c). If any vendor fails to comply with the State's Cigarette Stamp Tax Act or the Oklahoma Sales Tax Code, the Tax Commission shall determine the correct amount of tax due and issue an assessment for those taxes to the vendor by letter pursuant to 68 O.S. §221, and thereafter commence collection procedures. If a vendor continues to operate a business without paying the taxes imposed by State law, the State may institute any action necessary to enjoin such vendor from operating that business within Oklahoma, 68 O.S. §232.

The Tribe has sold and continues to sell, cigarettes and other taxable items from its place of business within the State of Oklahoma to the general public without regard as to whether its customers were tribal members or not. The Tribe does not collect the applicable State taxes on any of its sales and does not comply with the Cigarette Stamp Tax Act, 68 O.S.§ 301 *et seq.*, or the Oklahoma Sales Tax Code, 68 O.S. §1350 *et seq.*, in any respect. Based upon the Tribe's business activity, the State issued an assessment letter to the Tribe on March 4, 1987, in the amount of $2,691,470.70 for the sale and distribution of unstamped cigarettes, pet. cert. p. A-23.

After the State issued the assessment letter, the Tribe brought an action against the State in the United States District Court for the Western District of Oklahoma to enjoin the State from enforcing any State tax law against the tribal business and from assessing the Tribe for delinquent cigarette taxes, see complaint, op. cert. p. A-1. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the plaintiff is a federally recognized Indian tribe.

The State answered and brought a counterclaim, op. cert. p. B-1, pursuant to Rule 13(a) and Rule 18(a) of the Federal Rules of Civil Procedure seeking declaratory and injunctive relief, declaring that State tax laws do apply to the tribal business and may be enforced against the Tribe and enjoining the Tribe from operating its business until it fully complies with State tax laws. The Tribe moved to dismiss the State's counterclaim, which was denied by the District Court in its Order of May 29, 1987, op. cert. p. C-1.

The District Court entered its judgment, pet. cert. p. A-9, in this case on May 6, 1988, in accordance with its Order of April 15, 1988, pet. cert. p. A-12. The District Court found that it had jurisdiction of both the complaint and the counterclaim and ordered that the Tribe is immune from the application of State tax laws and therefore the State is enjoined from enforcing its tax laws against the Tribe, and from assessing the Tribe for delinquent taxes or collecting taxes from the Tribe. However, the District Court found that the land upon which the store was located was an Indian reservation under 18 U.S.C. §1151 and therefore, sales to tribal members were exempt from State taxation but sales to non-tribal members were subject to State taxes and the Tribe must aid the state in collecting these taxes under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). Both litigants appealed this decision.

On Appeal, the Tenth Circuit Opinion, pet. cert. p. A-1, first held that (1) the Tribe enjoyed sovereign immunity from unconsented suit, citing *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977); (2) Rule 13(a) of the Federal Rules of Civil Procedure did not waive the Tribe's immunity; and (3) the District Court lacked jurisdiction to adjudicate the counterclaim. The Court therefore reversed the trial court's denial of the Tribe's motion to dismiss the State's counterclaims and directed the lower court to dismiss all counterclaims against the Tribe.

The Appeals Court then found that the land where the tribal store is located was an Indian reservation and thus, "because the convenience store is located on land over which the Potawatomis

retained sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." The Appeals Court found that no such jurisdiction exists and rejected the State's citation of authority to this Court's opinions in *Moe* and *Colville* for the State's proposition that the Tribe must collect the State's taxes. The Court ruled that the Tribe was not amenable to any State law under the doctrine of sovereign immunity and imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or enforcing any tax law against the Tribe and its business.

SUMMARY OF ARGUMENT

This case involves the State's attempt to apply taxes to sales transactions at the tribal store and enforcement of those taxes by two methods; 1. assessment of delinquent taxes pursuant to State law, 68 O.S. §221 and 2. a lawsuit (in this particular case a counterclaim to the Tribe's complaint) to enjoin the operation of the tribal store until the Tribe fully complies with State tax laws pursuant to 68 O.S. §232. This case also includes the Tribe's attempt to avoid the application or compliance to State laws by enjoining the State from any enforcement action. The Tenth Circuit ruling provides that the Tribe is unresponsible to State laws and is unanswerable in Court to the State's action because of tribal sovereign immunity. Under this doctrine alone, the Tenth Circuit has imposed a broad injunction on the State from ever enforcing its tax laws in any respect against the Tribal business.

The State's first argument proposes that State taxes are applicable to the Tribe's sales transactions under the controlling authority of this Court's decision in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) which was rejected by the Tenth Circuit. The State argues that the State taxation does not infringe on the right of reservation Indians to make their own laws and be ruled by them because there are no reservations in Oklahoma. The several cession agreements and the work of the Dawes Commission in the years prior to Statehood disestablished the reservation system in Oklahoma and Congress has since that time intended that no reservations be re-established. Therefore, the Tribes in

Oklahoma have not been set apart from the State on a federal reservation and do not maintain a separate and independent existence apart from the general community, *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

The State concludes in its first argument, that there is no law or reason that would allow the Tribe to make untaxed goods available to the citizens of this State. Under the authority of *Colville*, the taxes are clearly applicable even on a reservation, and the case of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), holds that tribal activities conducted outside the reservation boundaries are subject to nondiscriminatory state law otherwise applicable to all citizens of the State. The Tenth Circuits opinion erroneously rejected the holding in these two cases in order to enjoin the application of state tax laws.

In the Second Argument, the State attacks the validity of the tribal sovereign immunity doctrine as a defense against the State action to assess or sue the Tribe in order to actually collect the tax revenue that the *Colville* case had presumably restored to the State. The State urges that the Tribe should not be allowed to infringe on the States rights to govern its internal affairs. The State points out that the taxes at issue are imposed on the customers of the store and do not tax the Tribe as a Tribe or regulate the internal affairs of tribal government. The Tenth Circuit's ruling enjoining the State from collecting its valid taxes impermissably burdens the administration of State tax laws in violation of the Tenth Amendment to the Constitution of the United States. Furthermore, the sovereignty doctrine is not useful in this day when the tribal activities are no longer restricted to the internal social relations of the Tribe as a separate people, but have increased in scope to include the community of the State at large. The Tribe is using the sovereignty doctrine of *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) in order to resurrect the intergovernmental immunity doctrine which was repudiated by *Mescalero* and a long list of other cases. There is no reason why the Tribe should not comply with State tax laws at its business, but there is no way the Tribe will comply with those laws as long as it can avoid any enforcement by way of Indian sovereignty. The sovereignty doctrine should be limited to the tribal courts and the internal affairs of tribal govern-

ment because of its encroachment upon the authority of the State to administer its laws.

ARGUMENT

I. STATE TAXES ARE APPLICABLE TO SALES OF CIGARETTES AND OTHER ITEMS AT THE TRIBAL STORE.

In 1976, this Court issued its opinion in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and held that Indian retailers on an Indian reservation must collect all state taxes applicable to sales to non-Indians;

> The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. . . We see nothing in this burden which frustrates tribal self-government. . .or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. . . We therefore agree with the District court that to the extent that the "smokeshops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

It appeared under the *Moe* decision that a straightforward and well-reasoned rule was developed with regard to tribally owned stores which sought to do business within the general community, and beyond the membership of the tribe, in that such businesses would be required to comply with State laws so that the tribal business could not be used as a means by non-Indians to evade their legal obligations. The Court realized that "Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."

In 1980, this court again ruled that tribal sellers were obliged to collect and remit state taxes on sales to non-tribal members at Indian Smokeshops on reservation lands in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The obligation of State tax laws were applicable to tribal smokeshops on Indian reservations in these two cases because the State's taxation of non-tribal members did not infringe on the right of reservation Indians to make their own laws and be ruled by them.

After balancing the interests of the Tribe and the State in the *Colville* case, this Court concluded that Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to non-members who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations. By balancing the interests of the State and the Tribe in *Colville*, this Court declined to subject the analysis to a strict, mechanical application of tribal sovereignty, but instead found that the obligations imposed by the State laws did not infringe tribal rights to self-government because the principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State on the other. And neither did the State's tax laws run afoul of any federal law preempting the State's right to tax its own citizens. This Court stated, "It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."

In the case at bar, the State is attempting to collect the taxes under the rationale of the *Moe and Colville* decisions that affirm the State's right to those tax revenues. However, the Tenth Circuit decision foreclosed the State's reliance on this Court's opinions by finding that those decisions are not applicable to Oklahoma because, since "the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the stores transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress," pet. cert. p. A-7. The Appeals Court found that the State's reliance on Colville was misplaced because the State of Washington had asserted jurisdiction over the tribes in *Colville* under Pub. L. No. 83-280, 67 Stat. 588, as opposed to this case where the lower court found that Oklahoma cites no federal law granting such jurisdiction, Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union, Oklahoma did not assert jurisdiction under Public Law 280, and the Tribe has not voluntarily submitted to jurisdiction. Therefore, the Appeals Court concluded that the State should be subjected to a broad injunction prohibiting the State from collecting sales taxes from the tribal store.

The Tenth Circuit also based its opinion on its finding that the tribal store was located on an Indian reservation as defined by 18 U.S.C. §1151(a). This finding was important to the opinion because the lower court could then dispense with this Court's authority in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which concluded that Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law otherwise applicable to all citizens of the State.

The State first questions the Appeals Court's finding that the land in question, held in trust for the tribe, is an Indian reservation, which fact would preclude the State's reliance on *Mescalero*. The State next questions the Appeals Court's ruling that the State has no jurisdiction to apply its tax laws to transactions at the tribal store, which ruling precludes the States reliance on *Moe and Colville*.

A. The Indian Reservation system has been disestablished in Oklahoma.

The issue of whether or not the tribal store in this case is located on or off of a reservation is drawn from the distinction made in the treatment of the companion cases of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *Mescalero*, the tribal business was held subject to State tax laws because it was operated off of the reservation, while the individual Navajo Indian in *McClanahan* was not subject to State income taxes because she lived and earned her income within the Navajo reservation in Arizona. In *McClanahan*,

this Court stated at 411 U.S. 171:

> "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." U.S. Dept. of the Interior, *Federal Indian Law* 845 (1958).

Although this passage only refers to Indians on a reservation as being exempt from State taxes, the Tenth Circuit has taken a broader view by ruling in this case that anyone who enters an Indian reservation to do business is exempt from State laws. The Tenth Circuit not only had to enlarge the rule in *McClanahan* in order to make this case fit in it, but the Appeals Court also had to disregard the last 100 years of history.

In *McClanahan*, this Court began its analysis with the treaty which the United States entered with the Navajo Nation in 1868 to provide a reservation for the use and occupation of the Navajo. Although the treaty nowhere states that the Navajo's would be exempt from State taxes, this Court interpreted the treaty to preclude extension of State law to the Indians because the treaty was intended by the Government to establish an exclusive federal reservation under general federal supervision.

The treatment of Indian tribes in the former Indian Territory, now Oklahoma, was much different than that of the Navajo experience. The Citizen Band Potawatomi Tribe was removed to a reservation in Indian Territory by the Treaty of February 27, 1867, 15 Stat. 531 where a reservation was established for the Tribe, see Order of District Court, pet. cert. p. A-13. This treaty clearly provided that such reservation shall never be included within the jurisdiction of any State, as was typical of all treaties creating tribal reservations in Indian Territory. However, during the ensuing years the reservation was allotted in severalty and, by the Act of March 3, 1891, 26 Stat. 1016, the Tribe agreed to "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character" in the reservation. The Presidential Proclamation of September 18, 1891, 27 Stat. 989, opened the ceded lands to settlement.

The District Court found in its Order, pet cert. p. A-15, that the subject reservation had been disestablished by the Act of March 3, 1891, citing *DeCoteau v. District County Court*, 420 U.S. 425 (1975) where this Court addressed the sum certain cession agreements which pertain to this case and found that those reservations had been terminated, see footnotes 21 and 22 at 420 U.S. 439 referencing the Potawatomi agreement. It is unmistakable that Congress intended to dispose of these reservations from the tenor of the remarks of Congressman Perkins, 22 Cong. Rec. 3784 (1891) cited in *DeCoteau* at 420 U.S. 440;

> The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progressive pioneers.

The subject tract of land in this case was thereafter held by the United States Government until it was conveyed to the Tribe by the Act of September 13, 1960, 74 Stat. 903, and the Act of August 11, 1964, 78 Stat. 392, which transferred title to the Tribe subject to no exemption from taxation or restriction on use, management or disposition because of Indian Ownership. The Congressional reports on these bills suggested conveying the land in unrestricted status in order relieve the Federal Government of responsibility for managing the land, see HR No. 1661, 86th Cong. 2d Sess., May 26, 1960; SR No. 1605, 86th Cong. 2d Sess., June 16, 1960; HR No. 1490, 88th Cong. 2d Sess., June 16, 1964. However, the land was later transferred in trust to the United States for the benefit of the Tribe by the Act of January 2, 1975, 88 Stat. 1922 in order to enable the Tribe to qualify for loans and grants from the Economic Development Administration, see SR No. 93-877, 93rd Cong. 2d Sess., May 23, 1974.

The District Court found that the transfer in trust indicated a renewed existence of federal superintendence such that this land is

an Indian reservation, pet. cert. p. A-17. The Tenth Circuit ruled that "lands held in trust by the United States for the Tribes are Indian Country within the meaning of 1151(a)." The Tenth Circuit based its finding on selected language from *United States v. John*, 437 U.S. 634 (1978) which refers to the test of determining Indian Country is whether the land has been set apart for the use of the Indians as such, under the superintendence of the Government. Besides quoting the text, the Tenth Circuit offers no statutory authority to uphold its finding in this case.

The State would submit that the Government did not intend to establish a reservation under the Act of January 2, 1975, because the transfer in trust was made to enable the tribe to qualify for loans to build a park and other public buildings and was not acquired for the purpose of providing land for the tribal members to live. A leading treatise on Indian law states that the modern meaning of an Indian Reservation refers to land set aside under federal protection for the residence of tribal Indians, Cohen, *Handbook of Federal Indian Law*, p. 34 (1982).

Further, the history of the creation of the State of Oklahoma suggests that the comprehensive plan of Congress at that time was manifested in Congress' intention to terminate federal supervision over Oklahoma Indians in *Williams v. Lee*, 358 U.S. 218 at 222 (1959), where the court found that, "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. See HR Rep. No. 848, 83rd Cong. 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worchester v. State of Georgia*, [6 Pet. 515 (1832)], had denied." In Note 6 at 358 U.S. 221, the Court noted examples of express grants of state authority by Congress including 28 U.S.C. 1360 (P.L. 280) granting broad jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin. The Court also stated that the series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in

U.S. Department of Interior, *Federal Indian Law* at 985-1051 (1958).

The section on laws relating to Oklahoma in the Federal Indian Law treatise is a detailed commentary of the Federal Government's policy in Indian Territory which was centered to a great extent on the work of the Commission to the Five Civilized Tribes, more commonly called the "Dawes Commission." This treatise discusses the Government of Indian Territory at page 991 and relates that Non-Indians overflowed into the Indian Territory and reached about a quarter of a million at the beginning of 1890. Although white settlement was illegal, the federal government did nothing to stop it. Many of these people strongly desired to substitute their own methods of government for those of the tribes despite treaty obligations. This was due in part to a general absence of effective law enforcement and a demand by the non-Indians to abolish the reservations so that land could pass freely into their hands and the Territory could be politically reorganized into a state.

By 1890, when the Oklahoma Territory adjacent to the Indian Territory was opened and a territorial government created, the clamor for allotment had reached a new peak. All the federal agencies responsible for Indian Affairs were advising Congress of the need to change the current system. The leading congressional proponent of allotment and assimilation was Senator Henry L. Dawes of Massachusetts. At his insistence, the Congress in 1887 passed the Dawes Severalty Act (24 Stat. 388) providing for allotments on Indian reservations with the remaining unallotted lands on those reservations to be purchased by the government and thrown open to homesteading.

The case of *Woodward v. DeGraffenried*, 238 U.S. 284, (1915) details the efforts of Congress to organize the Territories for Statehood. At 238 U.S. 295, the Supreme Court found that under the Act of March 3, 1893, known as the Dawes Commission Act, 27 Stat. 612, it was the declared policy of the Congress to seek the allotment of all reservations in Indian Territory. To this end Congress, at 16 of this same Act, created the Dawes Commission for the purpose of extinguishing the tribal titles, either by cession or allotment, with a

view to the ultimate creation of a state to embrace the lands within the territory. At page 296, n.1, the Court cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress; efforts which the Court describes as beginning in discouragement, but finally crowned with success.

There were twelve reports filed by the Dawes Commission with Congress between the years 1894 and 1905. Although the Commission to the Five Civilized Tribes, as it was officially called, was charged with negotiating the cession of land from the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, its broader mission was to restructure the government of Indian Territory with a view towards creation of a State for the Union. To this end the Commission concentrated its efforts on the Five Civilized Tribes because the smaller Tribes, such as the Potawatomies, were effectively divested of their reservations under the Dawes Severalty Act of 1887, which did not apply to the Five Tribes.

However, the reports of this Commission are important to this case because they give an accurate first-hand account of the conditions existing throughout the Indian Territory which greatly shaped the policies adopted by Congress and form a basis to develop an understanding of Congressional intent in regard to disestablishment of all reservations in Oklahoma and the admission of Oklahoma as a State. These reports are reproduced in the addendum accompanying the State's opening brief filed with the Tenth Circuit Court of Appeals.

Before the work of the Dawes Commission began, the Select Committee on the Five Civilized Tribes reported on the condition of government and the need to abolish reservations in the Indian Territory in SR No. 377, 53rd Cong. 2d Sess., May 7, 1894. See *Woodward*, 238 U.S. at 299, note 2. The Committee found that the Territory had no centralized government, insufficient law enforcement, no public education and a land monopoly that was organized under the reservation system whereby the best land was controlled by a few tribal leaders for their personal profit to the exclusion of all other tribal members.

The Committee called the system not only non-American but radically wrong and called for a change because "the situation grows worse and will continue to grow worse. There can be no modifications of the system. It cannot be reformed. It must be abandoned and a better one substituted." The Committee noted that this would be a difficult task because of the nature of tribal tenure to the land, but the Committee concluded that the Indian Tribes had breached the trust that was plainly provided in the treaties to hold this vast estate in land for the equal benefit of all Indian citizens and stated, "Whatever power Congress possessed over the Indians it still possesses, notwithstanding the several treaties may have stipulated that the Government would not exercise such power and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes."

Each of the Dawes Commission reports to Congress contain insightful commentary on the corruption of tribal governments, the lamentable failure of the reservation system, the difficulties of the Commission in tribal negotiations and the Commission's actions to overcome those difficulties and finally dispose of the reservations which involved one of the largest, most intricate and difficult undertakings in which the Government had ever been engaged to that point, in the estimation of the Commission.

The objectives of the Commission, the allotment of the land and the effacement of the tribal governments, were successfully obtained and the great effort of the Commission, spanning more than a decade, enabled the Federal Government to create a State to be admitted to the Union for the benefit and protection of the Nation itself, as well as the citizens who resided there.

As was its stated intent, the Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional State government capable of admission into the Union on an equal footing with the original States. This culminated in the report filed by the Commission on the Territories recommending Oklahoma statehood in HR Rep. No. 496, January 23, 1906, 59th Cong. 1st Sess. to accompany H.R. 12707,

The Oklahoma Enabling Act, 34 Stat. 167.

The foregoing reports form the authoritative Congressional history of the creation of the State of Oklahoma from the first-hand accounts of Congressmen and government official who where there. It is from this beginning that the State Government assumed the jurisdiction over all citizens of the State with the concurrent plenary power to tax all property unless specifically restrained by federal law.

From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the federal government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. This was not a mere surplus land act but a comprehensive program by the Federal Government to politically reconstruct the Territory. The assimilation policy of Congress at this time was so strong that the enactments of Congress were in complete derogation of the treaties made with the several tribes. Congress had concluded that since the tribal governments had violated their duties under the treaties and the federal government made no effort to enforce the agreements on its part, the treaties had to be set aside in order to restore a constitutional government in the Territory. Of course, the more influential tribal leaders who profited from the reservation system mounted opposition to the disestablishment of that system and pointed out that the treaties distinctly provide that the Indian lands would never be included within a state or territory. The fact that these reservations were eventually included within the State of Oklahoma, in spite of the treaties, only underscores more boldly the intent of Congress to dispose of all reservations in Oklahoma.

Of course the Indian tribes questioned Congress' ability to revoke treaty stipulations without their consent. However, this court put that question to rest in *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), where the Court ruled:

> Plenary authority over the tribal relations of the indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

The Court held in that case that Congress had the power to abrogate the provisions of an Indian treaty unilaterally. But even before *Lone Wolf,* the Supreme Court had determined that the treaties with the tribes in Oklahoma must yield to congressional enactments. In the *Cherokee Tobacco,* 11 Wall. 616, 20 L.Ed. 227 (1871) the Court ruled at page 229:

> A treaty may supersede a prior act of Congress *(Foster v. Neilson,* 2 Pet. 314), and an act of Congress may supersede a prior treaty. *Taylor v. Marton,* 2 Curt. 454; *The Clinton Bridge,* 1 Woolw. 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

The preceding argument paints a vivid picture of congressional intent to disestablish all reservations in Oklahoma. This intent and belief has carried forward to the present, and Congress has since

recognized that no reservations survived past Statehood. The Senate report on the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq., S.Rep.No. 1232, 74th Congress 1st Sess.,July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.

Against this background, this Court stated in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943):

> The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. *Worchester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory in the theory that the Indian tribes were separate political entities with all the rights of independent status~a condition which has not existed for may years in the Sate of Oklahoma.
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> * * *
>
> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worchester v. Georgia*, supra; and, unlike the Indians involved in The Kansas Indians case, supra, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.

The Supreme Court cited Oklahoma Tax Commission with approval in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, (1973) where the Court held that Arizona could not tax the income of an Indian on the Navajo reservation in that State. The Court stated at 411 U.S. 167-168:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not posses the usual accoutrements of tribal self-government. See e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

And again at 411 U.S. 171 of that opinion:

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).

The view held by Congress that no reservations remain in Oklahoma is also shared by the executive branch. The U.S. Department of Commerce published a handbook outlining various aspects of many of the Indian tribes in the United States entitled *Federal and State Indian Reservations and Indian Trust Areas* (1973). In the Oklahoma section of this handbook the D.O.C. noted:

> The Indian land status in Oklahoma is unique in comparison with Indian lands elsewhere. Because of special laws related to Indian-owned land in Oklahoma, there are no reservations in that State, insofar as the term generally applies to Indian lands in other parts of the United States.

> The members of the 27 tribes mentioned herein have been assimilated to such a degree that any statement made in reference to tribal economy, transportation, climate, community facilities, and recreation would reflect the status of the non-Indian community. Therefore, these headings have been omitted from the Oklahoma portion of this handbook.

Also, the *Map of Indian Lands and Related Facilities as of 1971*, compiled by the Bureau of Indian Affairs in cooperation with the Geological Survey, U.S. Department of Interior, identifies the "former reservations in Oklahoma."

The land in question in this case does not come within the category of an Indian Reservation because this Tribe has not developed a living tribal community apart from the general community of the State. This observation is borne out by the population statistics published by the Department of Commerce, Bureau of the Census in *American Indians, Eskimos and Aluets on Identified Reservations and in the Historic Areas of Oklahoma, (Excluding Urbanized areas) 1980 Census of Population*. On page VIII of the Census a map of Oklahoma notes that the "historic areas of Oklahoma" consist of the former reservations which had legally established boundaries during the period 1900~1907. These reservations were dissolved during the two-to-three year period proceeding the statehood of Oklahoma.

The Census also demonstrates the assimilation of the Indians of this Tribe. Table 13 of the Census shows that the total Indian population in Oklahoma is 113,367, compared with a total population in Oklahoma in 1980 of 3,025,000 *(Statistical Abstract of Oklahoma)*. Table 13 also shows that there are 529 Citizen Band Potawatomi Indians which reside in Cleveland and Pottawatomie Counties (these are contiguous counties and the tribal land is located in Pottawatomie County) and 424 are enrolled tribal members. The entire Indian population of all tribes in Cleveland and Pottawatomie Counties is 4036 compared with a total population in those counties of 133,173 and 55,239 respectively. A rough estimation of the percentage of Indians to the total population statewide is 4% and for Cleveland/Pottawatomie Counties is 2%.

All of these opinions expressed in Supreme Court decisions, Congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

This Court has held in *Solem v. Bartlett*, 465 U.S. 463 (1984) that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happened after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges de facto, if not de jure, diminishment, *Solem* at 465 U.S. 471, citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exists in Oklahoma.

To return to the case at bar, the Tenth Circuit opinion would read the law to mean that if an Indian tribe transfers land in trust, it then becomes an Indian reservation, and in effect a zone beyond the jurisdiction of State law, thereby enabling anyone to come onto that piece of land and conduct business free from responsibility to any State law as long as they are touching the land with one foot, as if "Indian Country" had some magical power to extinguish State laws like a legal kryptonite. The State would submit that in regards to the practical administration of any law in Oklahoma, the Tenth Circuit's theory is patently unreasonable.

B. The State has a right and a proper jurisdictional basis to apply tax laws to the Tribal business.

Regardless of whether or not the land held in trust for the Tribe is a reservation, the transactions at the tribal store in this case

are still taxable under the authority of *Moe and Colville*, supra. However, the Tenth Circuit found that those cases did not apply here because the State has not received an independent grant of jurisdiction from the Federal Government.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court rejected the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise whether the enterprise is located on or off tribal land. Also, in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. _____, 109 S.C. 1968 (1989), this Court stated that its approach to the question involved in that case of whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress due to the early legal theories of intergovernmental immunity. But more recently, due to the repudiation of that theory, such taxes have been upheld unless expressly or impliedly prohibited by Congress.

In the *Cotton* case, this Court found that non-Indian lessees were not exempt from state oil and gas gross production taxes even though the lessees were subject to the tax burden of both the state and the tribe because the leases were located both within the State of New Mexico and within the borders of the Jicarilla Apache reservation. The case at bar is similar to that situation because the sales transactions occur within the State of Oklahoma and on tribal land, between the Tribe and the non-members who make purchases at the store. It would be consistent with *Cotton* to allow both the tribal and the State tax on the transactions in this case, because the State is responsible for, and does provide, the full slate of State services to tribal members and non-members alike. It is significant in this case that tribal members do not live on the land in question or on a reservation, but have been assimilated into the non-Indian community and therefore enjoy the facilities of State government to the same extent as all other citizens.

The Tenth Circuit found that this assimilation was irrelevant because an Indian tribe exists apart from its individual members and

retains absolute sovereign powers which in and of itself preclude the application of State laws. This type of approach has died a thousand deaths in recent years, most recently in *Cotton*, where this Court ruled that although determining whether federal legislation has preempted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process. As a result, questions of preemption in this area are not resolved by reference to standards of preemption that have developed in other areas of the law and are not controlled by "mechanical or absolute conceptions of state or tribal sovereignty." Instead the Court has applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal, and tribal interests.

The State sees no federal preemption of its tax laws as they are applied to sales made by this Tribe at its store. Certainly, nothing in the Oklahoma Cigarette Stamp Tax Act, 68 O.S. §301 et seq., or the Oklahoma Sales Tax Code, 68 O.S. §1350 et seq., provides an exemption for Indians or Indian Tribes. Federal law also prohibits the Tribe's activity under the Trafficking in Contraband Cigarettes Act, 18 U.S.C. §2341 *et seq*. Conversely, there is no law which allows an Indian tribe to sell products to others for the purpose of helping those others avoid valid State taxes.

The State also asserts that the Federal policy toward tribal self-determination derived from the Constitution, does not preempt State taxes. The Federal Governments power over Indians is derived from federal responsibility for regulating commerce with Indian tribes, U.S. Const. Art. I, §8 cl.3 and for treaty making, Art. II, §2, cl.2. Only the power to regulate commerce remains since treaty making was abolished in 1871 by 25 U.S.C. §71. However, under the Commerce Clause, Indian tribes are not treated as a separate state or foreign nation. In *Cotton* at 109 S.C. 1716, the Court quoted Chief Justice Marshall's remarks that, "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes ~ foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct."

This Court also concluded in *Cotton* that it is well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.

> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other. *Cotton*, 109 S.C. 1716.

The State sales taxes involved in this case do not infringe on the Tribes right to govern itself because the tax is validly imposed on the consumers of the items purchased,68 O.S. §302, 1361, and is not a tax on the Tribe in its capacity as a Tribe. these taxes are a nondiscriminatory levy on the citizens of this State for the general revenue of the State Government and therefore do not purport to regulate or affect internal tribal affairs or self-government.

When an Indian tribe decides to operate a business in Oklahoma, the tribe does not have any right to help others evade State taxes. This point was addressed *Moe* where this Court found that to require the tribal seller to collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that non-Indians purchasing from a tribal seller will avoid payment of a concededly lawful tax.

The Tribe simply does not have any governmental interest, traditions, or rights to operate businesses in complete disregard of State law and generate business by offering non-members an exemption from State laws that they are properly subject to. The State

recognizes that the Tribe has an interest in tribal economic development. However, the State has an interest in collecting taxes from its citizens to fund the government. These interests are not mutually exclusive because requiring the Tribe to comply with State tax laws will fulfill the interests of the State and will not prevent the Tribe from sustaining its economic development, just as it does not prevent all other businesses from realizing a profit. Of course, if the Tribe did pay its taxes it would be required to work more vigorously to compete on a level playing field with all other businesses and there would be no guarantees of success. However, *Moe* and *Colville* make it clear that a Tribe has no vested right to a certain volume of sales to non-members, or indeed to any such sales at all. If the tribal store is a failure because of the increased cost of state taxation, then the store should be allowed to fail so that the Tribe can invest its money and energy into something else that is more profitable.

Application of State tax laws to the Tribe's business are not barred by sovereign immunity because the sovereign immunity doctrine has undergone considerable evolution in response to changed circumstances. In the case at bar, the Tribe's activity and interaction in the business community today is wholly different than the role of the tribal government in the early years of the Republic when *Worchester v. Georgia*, 6 Pet. 515 (1832), was decided, as this Court stated in *McClanahan*, Supra. Accordingly, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community, *Oklahoma Tax Commission v. United States*. Notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians.

The Tenth Circuit, however, found that the law enunciated in *Moe* and *Colville* cannot be applied in Oklahoma because Oklahoma disclaimed jurisdiction over Indian land upon entering the Union and did not assert jurisdiction under Public Law 280. This part of the Tenth Circuit ruling need not detain the Court because the Appeals Court is clearly wrong in its analysis. As has been stated in the Petition for Certiorari at pages 9-11, the Oklahoma Constitution disclaims all right and title to all lands within the State held by any Indian, Tribe, or nation.

This disclaimer language was construed by this Court in *Organized Village of Kake v. Egan*, 369 U.S. 601 (1962) at 69:

> The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest.

The disclaimer language in the Oklahoma Constitution was also construed as a disclaimer of proprietary rather than governmental interests by the Oklahoma Supreme Court in *State ex rel. May v. Seneca - Cayuga Tribe*, 711 P.2d 77, 87 (Okl. 1985). The disclaimer was made because the Federal Government had placed restrictions on alienation and tax exemptions on the allotments that had been granted before Statehood. In order to insure that Statehood would not effect the allotments that had been made, the disclaimer was placed in the Constitution of the new State. The disclaimer was not made to provide a vehicle for people to evade State laws. The decision in *Kake* indicates that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Therefore, the disclaimer is not an obstacle to enforcement of State taxes in the case at bar because it only concerns property rights in land, which is not at issue in this case.

Also, the Tenth Circuit ruling that Colville does not apply because Oklahoma has not asserted jurisdiction under P.L. 280 is clearly erroneous. The P.L. 280 law has no application to the State of Oklahoma and the Tenth Circuit's strained construction of that statute as a bar to State jurisdiction is solely based on implications drawn from what the statute *does not say*.

The Appeals Court reasons that since Oklahoma was not mentioned in the statute and since the State did not seek to assert jurisdiction under the statute, then no jurisdiction exists in which an application of *Colville* could be made. It never occurred to the Appeals Court that, first, Oklahoma had all necessary jurisdiction before P.L. 280 was enacted in 1953, see *Oklahoma Tax Commission v. United States*, supra (1943), and second, this Court never relied on P.L. 280 for its conclusion in *Colville* that the taxes imposed on sales

to non-members are valid. See also, *Cotton Petroleum*, supra, where state tax laws extended to on-reservation activity of non-members in the non-P.L. 280 state of New Mexico. The conclusion that P.L. 280 has no relevance to this case was also drawn in the Amicus Curiae brief of the United States, filed herein, at pages 16 and 17. The point is that this Court found that the tribal sellers in *Colville* were ordered to collect the State taxes on sales to nonmembers because State taxation of nonmembers on the reservation did not infringe on the Tribe's right to govern itself and was not preempted by Federal law.

Besides the unimpeachable authority in *Moe* and *Colville*, the conclusion that the transactions at the tribal store are subject to State taxes, is also the most reasonable approach. The citizens of this State who use the States facilities have no right to evade or avoid taxes that support those facilities. Even if the Indians have any right at all to be free of State taxes under some uncodified "federal policies" alluding to the Constitution, that is absolutely no excuse for anyone else. However, the mechanism employed for collecting cigarette and sales taxes is that the vendor, the Tribe in this case, must affix the cigarette stamps and collect the sales taxes which are paid by the customer, and then remit those taxes to the State. This system breaks down when the Tribe refuses to comply with these collection procedures, thereby enabling those who are properly taxable to escape the tax on a theory of Indian sovereignty that is not available to them as non-members.

II. TRIBAL SOVEREIGNTY CANNOT BE MAINTAINED AS A DEFENSE TO THE STATE'S LAWSUIT TO ENFORCE ITS RIGHT TO COLLECT TAXES.

The State's brief up to this point has shown that State and Federal statutes require the Tribe to collect cigarette and sales taxes on sales transactions at the Tribal store. The State has also shown that no reservations exist in Oklahoma, but that regardless of that fact, the State taxes at issue in this case are applicable to sales made by the Tribe to non-members pursuant to the *Mescalero*, *Moe*, and *Colville* decisions of this Court which hold that the State has a right to have its valid taxes collected.

However, these statutes and cases are not self-enforcing. The Tribe was certainly aware of all of these laws when it opened its store and the Tribe knew that it had an obligation to obey those laws and collect the taxes. The Tribe elected not to obey those laws because it could make more money by selling its merchandise unburdened by State taxes, in effect marketing an exemption to taxpayers who had no exemption. The State attempted to enforce these tax laws by assessing the Tribe for $2.7 million of delinquent taxes and filed a counterclaim in this lawsuit to enjoin the Tribe's illegal operation. These efforts have been fruitless up till now.

It does not concern the Tribe that its activity is illegal and an infringement of the State's affirmative right to have its taxes collected because the Tribe asserts a theory that it is possessed of absolute and unqualified sovereign immunity to any lawsuit or enforcement action of the State. And even though the State legislature and Congress and the United States Supreme Court has stated that the Tribe must collect these taxes, the reality is that if the Tribe refuses to comply, there is just simply nothing the State can do about it because of tribal sovereign immunity; according to the opinion of the Tenth Circuit Court of Appeals.

The vexing problem before the Court today is how to reconcile the State's enforcement of tax laws with Tribal sovereignty. And if these competing interests are irreconcilable, as the case at bar suggests, whose interests should yield. The *Mescalero, Moe* and *Colville* cases stand as testament to the State's right to collect taxes, but the Court never addressed the issue of enforcement of that right other than to mention in *Colville* that Washington's seizure of cigarettes in transit may be proper if the seizures occur off of the reservation. The Tenth Circuit, however, has enjoined the State from any enforcement in this case, including seizure of cigarettes.

The Tenth Circuit found that Indian tribes have sovereign immunity from suits to which they do not consent pursuant to this Courts decisions in *United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) and *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 (1977). The language in these cases is compelling to be sure. The *U.S.F.& G.* case states at 309 U.S. 512, "These

Indian Nations are exempt from suit without Congressional authorization." *Puyallup* reads at 433 U.S. 172, "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian Tribe."

The Court is fairly presented with a choice in the present case. If the Court takes the course which allows the State to sue the Tribe in order to collect taxes, the holding in *U.S.F.& G.* must be abandoned and the Tribe will be exposed to millions of dollars of delinquent tax liability. If the Court chooses the second path, and embraces the Indian sovereignty doctrine, the States rights under *Colville* will be totally unenforceable and this Court should reject those rights altogether because the Tribes will certainly ignore those rights safe in the knowledge that they cannot be sued. In all practicality, cigarette seizures in transit can never effectively enforce the law since movement of cigarettes across state lines cannot be traced. The State of Washington, in fact, has not been able to enforce its cigarette tax laws under this method.

In this regard, the most reasonable approach is to allow the State and the Tribe to settle their differences in a court of law rather than leave the adversaries with a pursuit of street justice in the form of self-help methods *vi et armis*. This Court must consider the fact that there are more than 400 tribal governments recognized by the United States located within the 50 States and countless local governments and subdivisions such that it is inevitable that conflicts will arise. By Article III, the Constitution anticipates that these conflicts should be resolved by the Judicial Department of the Government rather than surrender the various agencies to their own devices.

The State naturally suggests that the correct approach is to strike down the Tribe's immunity defense because it is most reasonable, given the two choices, to allow the State to collect its taxes with the ability to enforce those laws in Court. The State not only has a right to collect its taxes, but a duty as well, in order to fund and maintain the services of an ordered society. The State's interests in raising revenue for the support of the government was recognized in *Colville* as the reason behind the State's rights. However, a right implies a remedy since a right without a remedy is no right at all. The

enforcement of tax law by suit is so closely interwoven with the substantive right of the State to tax its citizens as to make the separation of the two wholly improper. To deny the remedy is to deny the right.

The State recognizes the Tribe's right to govern itself but does not recognize the Tribe's "right" to rearrange state laws by reason of its "sovereignty." In fact, Indian sovereignty is a misnomer because how can one who is subject to complete defeasance, according to *Rice v. Rehner*, 463 U.S. 713 (1983), claim to possess any sovereignty. The most that can be said is that tribal sovereignty is limited, if we can use the term "sovereignty" at all. This Court described it in *McClanahan*, supra, at 411 U.S. 173 as follows:

> The relations of the Indian tribes living within the boarders of the United States is an anomalous one and of complex character. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.

As long as the Tribes are acting "as a separate people" in regulating their internal and social relations, there is no conflict with State laws. The State will never presume to legislate with regard to who can be a tribal member, election of tribal officials or the form of tribal government and laws. It is undisputed that such things are left solely in the hands of the Tribe. The problem comes when the Indians are not a separate people but are assimilated into the General Community where they live, work and trade. When the Tribe reaches out to interact with non-members and invites the community into its business place, then the Tribe is not dealing with its internal affairs, and conflicts arise with State laws that do govern the lives and businesses of the community within which the Tribe has immersed

itself. When the Tribe reaches outside of its internal affairs, the Tribe steps into the reach of State law because the Tribe's limited sovereignty does not extend so far.

The Court should consider the reason why the Tribe is using the sovereignty defense in this case and compare that with the circumstances and reasoning of the doctrine in *U.S.F. & G.* and *Puyallup*. The *U.S.F. & G.* case was decided in the context of a wardship wherein the United States was bringing suit as trustee of the mineral resources of the Tribe. Since the Tribe was under tutelage to the United States, the cross-claim against the Tribe was dismissed. But *U.S.F. & G.* was decided on the grounds of the sovereignty of the United States in its capacity as a trustee and does not consider the Tribe's sovereignty in its own right. In *Puyallup*, the Court found that the State Court had no jurisdiction to regulate the Tribe's treaty protected fishing rights. Specifically, the Tribe was resisting the State Court's authority to require the Tribe to provide information to the State concerning the limitation of the number of fish the Tribe was allowed to catch. The Court recognized the practical problem of enforcement but found at 433 U.S. 178, that the Tribe could properly resist the States authority due to tribal sovereignty, however, this Court advised the Tribe that it may be in the Tribe's best interest to "voluntarily" provide such information. At this point, it is interesting to note Justice Blackmun's concurring opinion in Puyallup in which he stated:

> I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case.

The doubts arise in the case at bar because this case does not deal with the Federal Governments protection of a ward or with a tribe's protection of its treaty made fishing rights. Here, the Tribe is using the sovereignty doctrine as a barrier to valid law enforcement to enable the Tribe to illegally operate a business with the singular

ambition of fulfilling its lust for lucre. The Tribe certainly has no right to sell tax free goods to the people of Oklahoma, but the Tribe resists these laws only because it has the power to do so by way of the Indian sovereignty doctrine.

In this case the Tribe has displayed a reluctance to properly limit itself and an arrogance toward reason, borne principally out of the blind application of the sovereignty doctrine by the Tenth Circuit to any situation. This is the short-coming of the *Colville* case; State laws are made applicable to the Tribe but the Tribe is unanswerable in Court for violation of those laws.

The circumstances of today have changed enough to warrant an examination of the sovereignty doctrine. As we meet these new circumstances we can realize, as it has been realized with other doctrines which have been abandoned, that what appeared to be good yesterday, may be superceded by something better today. Our government was designed to respond to change rather than be swallowed up by it.

Nowadays, the Tribe must be responsible to State laws or else the State government will be mired in impotency for no reason at all. Alexander Hamilton stated that, "Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience . . . Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraints." If the Tribe expects to continue to integrate its business into the general business community of the State and remain unburdened by any law, the Tribe expects what never was and never will be. The *U.S.F. & G.* and *Puyallup* cases did not lead to that result.

James Madison stated in the debates at the Virginia Convention, 1788, "What is the meaning of government? An institution to make people do their duty. A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all. That the laws of every country ought to be executed, cannot be denied. That force must be used if

necessary cannot be denied. Can any government be established, that will answer any purpose whatever, unless force be provided for executing its laws?"

Although the Commerce Clause is a grant of plenary power to Congress to regulate the States and Indian Tribes, and this power is the seat of national policies concerning Indian Tribes, none of those policies reach so far as to empower a Tribe to extend its limited sovereignty over the State of Oklahoma to countermand State laws as in this case. This seems more incredible in light of the fact that a State is an indestructible component of the federal system and the Tribe is merely a defeasible vestige of history. The Tenth Amendment to the Constitution prohibits Congress from exercising its plenary power to impair a States sovereignty but Congressional power over Indian Tribes has no limit. No immunity from legislative invasion can be claimed for Indian tribes and the consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. *The Cherokee Tobacco*, 11 Wall. 616 (1871). Rather than Tenth Amendment protections, Indian Tribes are merely protected by federal policy derived from the Constitution which has vascilated from autonomy to assimilation and from termination to self-determination. But whatever the federal policy has in store for Indian tribes now and in the future, this policy is purely a function of the Federal Government, and the power to implement any federal policy is limited to the extent that policy might operate to excessively infringe on the states rights in violation of the Tenth Amendment. Therefore, the policy of tribal self-government may not be used by the Tribe to sell tax exemptions to the taxpayers of Oklahoma.

It is conceded that State tax enforcement against Indian Tribes would cause theTribe to operate their business differently or choose not to go into business at all. Indeed, in this case the effect on the Tribe will include a substantial tax liability for all the years of unpaid taxes. But the tax laws in question do not regulate tribal government or affairs or attempt to tax the Tribe as a Tribe. The only reason a Tribe would ever owe sales and cigarette taxes is if the Tribe breached its duty to properly collect and remit the taxes from its customer. The Tribe in this case is trying to revive the repudiated

doctrine of intergovernmental tax immunity by asserting tribal sovereignty. The State may not tax the Tribe, but the Tribe may not claim tax exemptions for customers merely because they made their purchases at a store owned by the Tribe. Any exemption owing to the Tribe itself does not extend so far.

If the Tribe is unanswerable to State laws because of its immunity derived from federal policy, then the Tribe will expand its operations into every area in which the State heavily taxes or regulates in order to undermine the States authority. It will not be denied that power is of an encroaching nature, and that it ought to be effectually restrained from passing limits assigned to it, Madison Federalist No. 48. It is also undeniable that the framers of the Constitution included the Tenth Amendment in order to protect the States rights to exercise its powers of government within our system of federalism and to tax its citizens in order to fund that government. When the framers of the Constitution considered this form of federalism Madison described the importance of the States to the National government in The Federalist No. 45 entitled "Constitution not Dangerous to the States":

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and property of the State.

The Tenth Amendment has however, weathered some construction by this Court in recent years when *Garcia v. San Antonio Metro*, 469 U.S. 528 (1985) overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). But even *Garcia* recognized that the States occupy a special position in our constitutional system and that

the scope of Congress' authority under the Commerce Clause must reflect that position. Justice Powell's dissent in *Garcia* correctly perceives that the founders of our Country intended more than that. Justice Powell wrote at 469 U.S. 571:

> The framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to State government. For example, Hamilton argued that the States "regulate all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . "The Federalist No. 17, p. 107 (J. Cook ed. 1961). Thus he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government. Madison took the same position, explaining that "the people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship; and of family and party attachments . . ." The Federalist No. 46, p. 316 (J. Cook ed. 1961). Like Hamilton, Madison saw the State's involvement in the everyday concerns of the people as the source of their citizens loyalty.

The Tenth Amendment was intended to fully guarantee the States' rights for separate and independent existence and place a limit on the Federal Government's power to interfere with or impair the States' integrity or its ability to function in a federal system for the protection of the Nation.

In many articles of the Constitution, the necessary existence of the States, and, within their proper spheres, the independent authority of the States is distinctly recognized, Usery citing *Lane County v. Oregon*, 7 Wall. 71 (1869). In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 (1926) the Court likewise observed that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." The Court in Usery added that "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

The State does not contend that *Garcia* is wrong because within the context of that case, it is certainly reasonable that State employees should be paid a least minimum wage and enjoy the protections that all other employees enjoy. However, the Court should not allow the Tribe to frustrate the States ability to collect the revenues necessary to pay those wages under a federal policy of tribal self-government which does not apply to the circumstances of the Tribe in this case. The State's ability to levy taxes on its citizens for the support of the government can be nothing but a function essential to separate and independent existence.

The Tenth Circuit's opinion enjoining the State from collecting its taxes is violative of the Tenth Amendment to the United States Constitution as a direct burden on the States administration of its tax laws. There is no reason why the government of the State should be prevented from taxing its own citizens upon transactions occurring within this State, at the tribal store. It could not be maintained that the Federal Government could prevent the State from collecting its taxes and the presumption that the Tribe could do so is totally unfounded. See *Coyle v. Smith*, 221 U.S. 559 (1911), each state is competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.

In the case at bar, the Tribe should not be allowed to raise an immunity defense to these taxes which are undoubtedly applicable to its transactions. At one time intergovernmental tax immunity was

once much in vogue in a variety of contexts stemming from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and his conclusion that the power to tax is the power to destroy. This position has changed in recent years and a long litany of cases that need not be recited here, have thoroughly repudiated the doctrine. One reason that the intergovernmental immunity doctrine failed is that taxes are indispensable to the maintenance of a government and within our federal system, the tax base of the various governments could be undermined by the doctrine. Also, the doctrine was used by persons who were properly taxable to evade those taxes. Besides tax evasion, another practical problem facing the State rests in the inherent psychology of taxation in that, when an exemption from tax is granted, the taxpayers then try to bring themselves within the exemption by disguise in form or a substantive change in their business. For example, if the government of a country decides to impose a tax upon all horses except white horses, the country will be instantly filled with nothing but white horses. By analogy in Oklahoma, the State is witnessing businesses who tie themselves to the government of a tribe with licenses, quit claim deeds, consignment agreements, etc... and produce substantial amounts of untaxed sales in this State under the erstwhile Indian exemption.

Such a case was before the Court in *New York v. United States*, 326 U.S. 572 (1946), in which New York purchased the Saratoga Springs in order to conserve the natural resources of the springs. The State bottled the spring water, commercially marketed it and claimed intergovernmental immunity from the federal soft drink tax. Up until that time, the States had been immune to federal taxes because of the supposed implications of our federal system. But seeing that this immunity was undermining the tax base of the soft drink tax laws, the Federal Government challenged the immunity which was struck down by this Court. The intergovernmental immunity doctrine was abandoned that day because it had outlived its usefulness when the Court recognized the vast extension of the sphere of government, both State and national compared to that with which the Fathers were familiar. Even though the doctrine had been a fixture in American jurisprudence since the birth of the nation, the Court found that the doctrine no longer fit the needs of modern government. "To press a juristic principle designed for the practical

affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense" 326 U.S. at 577.

In deciding that case, the Court held Congress may not lay taxes, for instance, upon a Statehouse or a State's tax revenues because these could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taxes a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. Congress may exempt states while taxing private enterprises, however:

> If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Likewise, the Potawatomis may carry out its own notion of social policy in engaging in the cigarette business, but it must pay its share in having a nation, a state and a federal system which enables the Tribe to pursue its policy. State taxation of the tribal business does not infringe the Tribe's right to self-government. The State's taxes will not regulate or control tribal meetings or cultural events or affect the course of tribal government by taxing the Tribe as a Tribe. The Tribe in this case is asserting the inter-governmental immunity doctrine under the name of Indian sovereignty. This doctrine has been rejected because it is not practical in today's world as the Tribes are extending the scope of their activities ever deeper into the affairs of the State's community, see *Mescalero Apache Tribe v. Jones*, supra.

In point of fact, the Tribe can point to treaty provisions which describe greater immunities than the Tribe enjoys today, but those

laws did not remain static throughout the course of history. The relationship of the new nation and the Indian tribes 200 years ago bears little resemblance to the relationship that exists today, in view of the many different businesses that Tribes are engaging in. Further, the statesmanship practiced by the Dawes Commission dismantled those immunities in order to put the last piece of the continental United States in place. Whether or not these decisions were unfair does not negate the fact that laws respecting the tribes in Oklahoma were changed. That laws will change is an essential nature of government. "The science of government is the most abstruse of all sciences, if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment", *New York v. United States*, citing *Anderson v. Dunn*, 6 Wheat. 204, 226.

There is no reason why a tribally owned business should not pay taxes just as all other business do. Such a result would not prevent the Tribe from operating a business nor affect the way in which the Tribe governs itself. The Tribe should not be allowed to resurrect the intergovernmental immunity doctrine via the sovereign immunity defense. The circumstances of yesteryears tribal sovereignty have changed from those days of wardship to the circumstances of today where the Tribe is increasing the scope of its activities beyond its own membership. For these reasons, the defense of tribal sovereign immunity to the State's lawsuit to enforce taxes should be overruled.

CONCLUSION

The Oklahoma Tax Commission respectfully requests that this Court reverse the opinion of the Tenth Circuit Court of Appeals which dismissed the State's counterclaim against the Tribe and enjoined the State from enforcing tax laws against the tribal business. Under the controlling authority of *Washington v. Confederated Tribes of Colville*, supra, the sales at the tribal store are taxable. Further, the tribal sovereign immunity defense to the States lawsuit should be struck down as unreasonable in light of the Tribes activities that include and affect non-members, *Mescalero Apache Tribe v. Jones*.

Respectfully submitted,

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No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Tenth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can assess a tax against an Indian tribe?

2. Whether a state can pursue a counterclaim when sued by a Tribe solely seeking injunctive relief from an unlawful, proposed state tax assessment?

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CITATIONS OF OPINIONS AND JUDGMENTS

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following constitutional provisions, treaties, statutes, ordinances and regulations are involved in this case.

A. Constitutions

1. United States Constitution

> Section 8. The **Congress shall have power to** lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
>
> . . .
>
> To **regulate commerce** with foreign Nations, and among the several States, and **with the Indian tribes**;
>
> . . .
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. art. I, §8.

2. Constitution of the State of Oklahoma

> **The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to** any unappropriated public lands lying within the boundaries thereof, and to **all lands lying within said limits owned or held by an Indian, tribe, or nation**; and that until the title to any such public land shall have

been extinguished by the United States, the **same shall be and remain subject to the jurisdiction,** disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the state shall never be taxed at a higher rate than the land belonging to the residents thereof. No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Okla. Const. art. I, §3.

All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges, and all property used exclusively for religious and charitable purposes, and all property of the United States, and of this state, and of counties and of municipalities of this state . . . shall be exempt from taxation . . . and **such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws** . . .

Id. at art. X, §6.

3. Potawatomi Tribal Constitution

Section 1. The jurisdiction and governmental powers of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall, consistent with applicable federal law, extend to all persons and to all real and personal property, including lands and natural resources, and to all waters and air space within the Indian Country, as defined in 18 U.S.C. §1151 or its successor, over

which the Citizen Band Potawatomi Indian Tribe of Oklahoma has authority.

Constitution of the Citizen Band Potawatomi Indian Tribe of Oklahoma, art. 4 (June 26, 1936).

B. Treaties

ARTICLE 1. It being the intention of the government that a commission shall visit the Indian Country . . . , it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the **exclusive use and occupancy of that Tribe** . . .

. . .

ARTICLE 3. **After such reservation shall have been selected and set apart for the Pottawatomies, it shall never be included within the jurisdiction of any state or territory**, unless an Indian Territory shall be organized, as provided for in certain treaties made in Eighteen Hundred and Sixty-Six with the Choctaws and other tribes occupying "Indian Country;" in which case, or in case of the organization of a legislative council or other body, for the regulation of matters affecting the relations of the tribes to each other, the Pottawatomies resident thereon shall have the right to representation, according to their numbers, on equal terms with the other tribes.

Treaty of Feb. 27, 1867, United States – Pottawatomie Tribe of Indians, 15 Stat. 531.

C. Statutes

That all that portion of the United States now known as the Indian Territory (except so much of the same as is actually occupied by the five civilized tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee Outlet), together with that portion of the United States known as the public land strip, is hereby erected into a temporary government by the name of the territory of Oklahoma . . .

Congress may at any time hereafter change the boundaries of said territory, or attach any portion of the same to any other state or territory of the United States, without the consent of the inhabitants of the territory hereby created: **Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians,** their lands, property or other rights which would have been competent to make or enact if this act had not been passed.

Organic Act, May 2, 1890, 26 Stat. 81, §1.

That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory,

as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: **provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise,** which it would have been competent to make if this act had never been passed.

Enabling Act, June 16, 1906, 34 Stat. 267, §1.

That the delegates to the convention thus elected shall meet at the seat of the government of said Oklahoma Territory on the second Tuesday after their election . . . and after organization, shall declare on behalf of the people of said proposed state, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and state government for said proposed government. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution:

. . .

Third. **That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any**

> **Indian, tribe, or nation; and that until the title to any such public lands shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States.** That land belonging to citizens of the United States residing without the limits of said state shall never be taxed at a higher rate than the land belonging to residents thereof; **that no taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.**

Id. at §3.

D. Executive Proclamation

> And Whereas, it appears that the said constitution and government of the proposed State of Oklahoma are republican in form and that the said constitution makes no distinction on civil or political rights on account of race or color, and is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, and that **it contains all of the six provisions expressly required by Section 3 of the said act to be therein contained;**
>
> . . .

Proclamation of Statehood, Nov. 16, 1907, no. 6869.

COUNTER-STATEMENT OF THE CASE

The Oklahoma Tax Commission ("Commission") is the petitioner. The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") is the respondent. This

action arose when the Potawatomis sought federal injunctive relief from the Commission's proposed $2.7 million tax assessment against the Potawatomis.

The Citizen Band Potawatomi Indian Tribe – Background

The Citizen Band Potawatomi Indian Tribe of Oklahoma is a remnant of a vast Indian nation which inhabited most of the Great Lakes area for centuries until the white man arrived. "The traditional home of the Potawatomi seems to have been in the lower peninsula of Michigan."[1] Like most Indian tribes, the Potawatomis were pushed out of their native lands by the federal government and marched to various reservations. "Faced with a choice between the [white] settlers' demand for the land and its promise to the Indians, the government took the predictable course. Often with the use of military action, it forced many tribes to cede their lands in exchange for money and a promise of exclusive control over smaller areas called reservations."[2] The following description of the Potawatomis' removal to the West is typical: "subjected to fraud and chaotic planning, the

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[1] L.N. Horton, "A Forest People of the Plains: The Potawatomi Indians", in R.E. Smith, *Oklahoma's Forgotten Indians* 24 (Okla. Historical Society 1981); *see also* G.I. Quimby, *Indian Life in the Upper Great Lakes: 11,000 BC to AD 1800* 108-112 (Chicago: Univ. of Chicago Press 1960).

[2] S. O'Brien, "Federal Indian Policies and the International Protection of Human Rights" in V. Deloria Jr., *American Policy in the Twentieth Century* 50 (Univ. of Okla. Press, Norman, Okla. 1985).

Potawatomis often were marched west under the supervision of political hacks more interested in making money than in the welfare of their charges . . . [which caused] undue suffering".[3] "Scores fell by the wayside. Mothers carried dead babies they could not bring themselves to abandon. In one town so many people dropped from heat, exhaustion, lack of water and proper food, if not from utter despondency, that a doctor was called, and he found 300 'cases of sickness'."[4]

Although the Potawatomis were pushed West in the late 18th century,[5] they were not removed from their Great Lakes homeland until the signing of the Treaties of Chicago in 1833.[6] After 37 years of being moved from place to place as the white settlers continued to push west,[7] the Potawatomis were authorized by federal treaty

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[3] R.D. Edmonds, *The Potawatomis: Keepers of the Fire* 272 (Univ. of Okla. Press 1978).

[4] J.U. Terrell, *Land Grab – The Truth About 'The Winning of the West'* 90 (Dial Press, N.Y. 1972).

[5] *See e.g.* Treaty of Greenville, 1795, 7 Stat. 49 (Aug. 3, 1795); Treaty With the Potawatomi, 1815, 7 Stat. 123 (July 18, 1815); *see also* 7 Stat. 160 (Sep. 29, 1817) (certain lands in Ohio, Indiana and Michigan ceded); *id.* at 185 (Oct. 2, 1818) (certain lands in Illinois and Indiana ceded). The Potawatomis are, along with the Chippewas, the most treatied Indian tribe in history. 26 Chronicles of Oklahoma 443 (Okla. Historical Society 1948).

[6] *See* 7 Stat. 431 and 442 (Sept. 26, 1833), reprinted in II C.J. Kappler, *Indian Affairs Laws and Treaties* 402 (1904). By these treaties the Potawatomis ceded to the United States five million acres of land in Wisconsin, Illinois and Michigan.

[7] The Potawatomis were moved, *inter alia*, to Iowa ("Trader's Point, near the present boundaries of Pottawatomie

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to purchase 576,000 acres in Indian Territory[8] for the purpose of establishing a reservation which they did in 1870.[9]

Under the treaty which authorized the creation of their reservation, the Potawatomis were promised that

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and Mills Counties, Iowa"; Horton, *supra* p. 27), Missouri and Kansas. Each move was to a "permanent" home, *e.g.* Treaty With the Potawatomi Nation, 1846, 9 Stat. 853, art. 5 (June 5 and 17, 1846) ("as their land and home forever"). "After much hardship and heartbreak the Potawatomi arrived at the Osage River but the pressure of the expanding frontier failed to diminish. The influx of settlers was unrelenting. The displaced Indians were the victims of speculators, corrupt agents and politicians. Their timber was cut, their game was killed. The railroad, which built the 'Great West,' destroyed their rights and reservations . . . The Potawatomi were soon forced from the Osage River to the Kansas River west of Topeka but even this 'permanent' home was soon crumbling." J. Scott, *The Potawatomi: Conquerors of Illinois* (a pictorial history of the Potawatomi Indians of North America), p. 17 (Streator Historical Society, Streator, Illinois, 1981). *See generally Prairie Band of Potawatomi Indians v. United States*, 165 F.Supp. 139, 142-144 (Ct. Cl. 1958), cert. denied *sub nom. Hannahville Indian Community v. Prairie Band of Potawatomi Indians*, 359 U.S. 908 (1959).

[8] The land was purchased by the Potawatomis from Seminole and Creek Sessions for $199,796.08. This purchase was pursuant to Article 3, "February 27, 1867 Treaty", 15 Stat. 531.

[9] *See e.g.* OIA, Record Letters Sent, No. 11, p. 7 (Nov. 9, 1870). The original reservation includes much of what is today Pottawatomie County, part of eastern Cleveland County, part of southeastern Oklahoma County, and a few acres of southwestern Lincoln County. For the Court's convenience, a map showing the reservation boundaries and a portion of the present tribal land is provided after the signature page.

their lands "shall never be included within the jurisdiction of any state". Art. 3, "February 27, 1867 Treaty", 15 Stat. 531 (1868). These promises have never been revoked and were protected in the federal laws which authorized statehood for Oklahoma.

However, no sooner had the Potawatomi reservation been established than the federal government began an allotment policy. The ultimate purpose of this allotment policy was to create "surplus" land within the reservation for white settlement.[10] Over the next 25 years, most of the Potawatomi land was taken by the federal government. The government allotted some for distribution to individual Indians, held some for the benefit of the Potawatomis, and opened the "surplus" for settlement by non-Indians.[11] President Benjamin Harrison opened the

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[10] "Even removal to the Indian Territory did not protect the Potawatomis from white pressure. By 1876, squatters were encroaching on their new land. The agent reported that many white people were moving in and laying claims. Most of these white men, he claimed, were former outlaws, and these activities seemed in violation of the law, too." Horton, *supra* p. 37. "The Potawatomis . . . prospered in the new home, although they were soon to suffer again from the seemingly eternal plague of the white intrusion. White men entered their reservation, killing what little wild game was left, and in other ways they complicated the adjustment of these tribes." I G. Litton, *History of Oklahoma at the Golden Anniversary of Statehood* 267 (Lewis Historical Pub. Co., Inc. New York 1957).

[11] The allotments of the Potawatomi reservation land were authorized May 23, 1872. *See* 17 Stat. 159, reprinted in IV C.J. Kappler, *Indian Affairs Laws and Treaties* 946 (1927). The allotments actually began in 1875 and continued for 15 years when – after the passage of the "Dawes Act" (General

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Potawatomis' "surplus" lands (about 265,000 acres) for settlement by non-Indians on September 22, 1891.

Although this "allotment policy" dispersed and weakened the Tribe, the Potawatomis retained a presence within the original reservation boundaries.[12] "[T]he Potawatomis survived and many of them still live on the lands chosen by their ancestors in 1869." *Horton, supra* p. 38. In 1938, the Potawatomis organized a tribal government under the Oklahoma Indian Welfare Act.[13] The purpose of this act was to help the Indians help themselves.

> There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities nonexistent. Enactment of this legislation will open the door for many of these poverty-stricken people.

H. R. Rep. No. 2408, 74th Cong., 2d Sess. (1936). Now, just as the "open door" is showing some results beneficial to

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Allotment Act of 1887; 24 Stat. 388) – the remaining reservation lands were allotted, held by the federal government for use of the Potawatomis, or the "surplus" sold to white settlers. *See* 26 Stat. 1016 (Mar. 3, 1891). The approximate apportionment was 287,470.89 acres allotted, 510.63 acres held by the federal government for the Tribe, 22,653.55 held for schools, and 265,241.93 "surplus" opened for white settlement.

[12] The Potawatomis' tribal land now consists of approximately 371 acres exclusive of allotments. *See* map.

[13] Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§501-510).

the Indians, the state is seeking the judiciary's help in reneging on promises to the Potawatomi Indians.

The Citizen Band Potawatomi Indian Tribe – Now

The Potawatomis have a tribal enrollment exceeding 10,000, operate on an annual budget exceeding $10 million,[14] have over 50 full-time employees and over 70 part-time employees, operate an 18-hole golf course, a convenience store, a tribal newspaper (How-Ni-Kan), a bingo hall, a museum and are the majority stockholder in a local bank in Shawnee. The Tribe has a Tax Commission, a Police Department and a Tribal Court. Although the Potawatomis cooperate closely with local authorities,[15] they receive virtually no services from the State. The annual Potawatomi Pow-Wow provides a substantial economic boost to the local community. The Potawatomis have contracted to operate the local office of the Bureau of Indian Affairs and administer numerous federal programs. The Potawatomis have contributed property to the City of Shawnee, donated training and supplies to the Pottawatomie County Sheriff's Office, and co-sponsored the Older American Aid Program which provides in-home health assistance to Indians and non-Indians alike. More than 100 people per year receive job training

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[14] This budget figure includes federal monies administered by the Potawatomis, as well as income from tribal taxes and tribal enterprises.

[15] The Mayor of Shawnee and Pottawatomie County Commissioners endorsed by resolution the placing of Potawatomi lands in trust. *See* doc. no. * [no number was assigned to this pleading, but it appears on the docket sheet between documents 39 and 40], exhibits of parties in support of opening briefs, PX-14, filed 6/22/87.

through the tribal JTPA program and an additional 60 economically disadvantaged youths receive training and employment through the summer months. The Potawatomis pay an average of $20,000 per year to state-supported institutions of higher education attended by tribal members.

The Tribe is governed by a five-man Business Committee whose members receive no salary and have no claim to any revenues generated by tribal enterprises. All revenues generated by tribal enterprises are used to pay administrative costs, enhance tribal assets or are distributed to needy members of the Tribe.

The Potawatomis' status as an Indian tribe is recognized by the United States[16] and by Oklahoma[17]. Consistent with Congressional policy,[18] the Potawatomis engage in numerous enterprises in an attempt to become self-sufficient. One of these enterprises is a convenience store known as the "Potawatomi Tribal Store" (also known as "Gallery Trading Post") which the Potawatomis wholly own and operate. The Potawatomi Tribal Store was constructed with federal funds and is located on lands within the Potawatomis' original reservation boundaries.[19] These lands have, since establishment of the Potawatomi

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[16] *See* 25 U.S.C. §503; 50 Fed. Reg. 6055 (1985).

[17] "The State of Oklahoma acknowledges federal recognition of Indian tribes recognized by the Department of the Interior." OKLA. STAT. tit. 74, §1221 (1990 Supp.). *See also* Brf. 2.

[18] See e.g. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); 25 U.S.C. §450 et seq. and §1451 et seq.

[19] *See* map after signature page.

reservation, been held by the Tribe or by the federal government for the benefit of the Tribe. They are now held in trust by the United States government for the benefit of the Tribe.[20]

The Oklahoma Cigarette Tax

The Commission taxes the sale of cigarettes "within the State of Oklahoma" pursuant to the Cigarette Stamp Tax Act.[21] Sellers of cigarettes in Oklahoma are required to be licensed:

> Every manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes **in this state**, as a condition of carrying on such business, shall annually secure from the Tax Commission a written license. . . . [22]
>
> * * *
>
> Every retailer **in this state**, as a condition of carrying on such business, shall annually secure from the Tax Commission a license. . . . [23]

No license "shall be issued . . . to or held by a person who is not an actual resident and domiciled in" Oklahoma.[24]

Payment of the cigarette tax must be evidenced by stamps purchased from the Commission.[25] The stamps

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[20] Under the statutes authorizing the federal government to take these lands in trust, the lands are "exempt from state and local taxation". 25 U.S.C. §465; see also 25 U.S.C. §503.

[21] OKLA. STAT. tit. 68, §301 *et seq.* (1981).

[22] *Id.* at §304(a) (1990 Supp.) (emphasis added).

[23] *Id.* at §304(b) (1990 Supp.) (emphasis added).

[24] *Id.* at §319.

[25] *Id.* at §302 (1990 Supp.).

must be affixed to the cigarettes by every wholesaler "doing business" within the state[26] and it is the wholesalers' "duty" to supply the retailer with the necessary stamps to cover all "drop shipments" of cigarettes.[27]

The Oklahoma Cigarette Stamp Tax is imposed upon the "first sale" within the state. "First sale" means first sale or distribution of cigarettes in intrastate commerce or first use or consumption within Oklahoma.[28] There can be, and is, only one "first sale". The cigarette stamp tax is imposed "only once on any cigarettes sold, used, received, possessed, or consumed in the state."[29]

Under this tax scheme, the wholesaler usually makes the "first sale" within the state. In recognition of this fact, wholesalers are authorized to purchase tax stamps in bulk at a discount.[30] Thus, despite the statutory declaration that the "impact of the tax" is "on the vendee, user, consumer or possessor",[31] the tax is clearly upon the wholesaler who pays for and affixes the tax stamps or, in

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[26] *Id.* at §305(a).

[27] " '[D]rop shipment' shall mean and include any delivery of cigarettes received by any person within this state when payment . . . is made to the shipper or seller by or through a person other than the consignee." *Id.* at §301(i) (1990 Supp.).

[28] *Id.* at §301(g) (1990 Supp.).

[29] *Id.* at §302 (1990 Supp.).

[30] *Id.* at §311.

[31] *Id.* at §302 (1990 Supp.). This declaration was added to Oklahoma law in 1953 [1953 Okla. Sess. Laws 326 (eff. June 10, 1953)] after the Internal Revenue Service refused to allow an Oklahoma "consumer" a "sales tax" deduction [26 U.S.C. §23(c)(3) (1951)] for cigarette taxes paid. *See Commissioner of Internal Revenue v. Thompson*, 193 F.2d 586 (10th Cir. Okl. 1951).

the case of "drop shipments", on the retailer receiving the cigarettes. Because of spoilation, theft, or non-sales, the wholesaler or retailer never recovers what he pays for these tax stamps on an equal basis per pack.

If a person sells unstamped cigarettes in Oklahoma, the Commission requires that person to pay *twice* the amount of tax due.[32] The Commission issues a letter to the putative taxpayer proposing to assess the tax, as doubled, plus a 10% penalty[33] and 1.25% per month interest.[34] The taxpayer must file a written protest within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final.[35] A final assessment is like a final judgment; when filed with the county court clerk it can be executed upon and constitutes a lien on all of the taxpayer's real estate in the county.[36]

The Potawatomi Cigarette Sales

The Potawatomis have never had an Oklahoma sales tax license or cigarette stamp tax license. Since establishment of their reservation until today, they have consistently sold items to the general public without collecting any state taxes.

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[32] OKLA. STAT. tit. 68, §305(c) (1981).

[33] *Id.* at §217(c) (1990 Supp.).

[34] *Id.* at §217(a) (1990 Supp.). At the time of the Commission's proposed assessment here, the interest was 1%.

[35] *Id.* at §221(e) (1990 Supp.).

[36] *Id.* at §221(h) (1990 Supp.).

After first following federal law,[37] the Potawatomis began selling cigarettes in August 1982. Before being sold, the cigarettes are affixed with the Potawatomis' own tax stamp. The proceeds of the Potawatomi cigarette tax and the profits generated by the tribal store finance tribal operations. The Potawatomis did not have, nor had it ever been required to obtain, a license from the Commission for such sales. The Tribe did not affix state tax stamps, nor collect the state's cigarette tax on its cigarette sales, nor had the Commission ever asked the Potawatomis to purchase, and the Potawatomis have never purchased, a Commission license to sell cigarettes. The Commission never informed the Tribe through written notice that it considered the Tribe or its activities to fall within the Commission's cigarette tax scheme nor did it attempt to license or assess the Potawatomis with any tax prior to February 12, 1987.

In fact, to this date, the Commission takes the position that the wholesaler selling to Indian tribes is liable for the cigarette stamp tax. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), cert. denied, 111 S.Ct. 75 (1990). In *City Vending*, the Commission assessed taxes against the wholesaler for cigarettes sold to Indian tribes, including some of the same sales to the Potawatomis covered in the proposed assessment at issue here. City Vending protested. It was

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[37] The Potawatomis enacted a cigarette tax ordinance consistent with federal (18 U.S.C. §1161) law which has been approved by the federal government and been published in the Federal Register. 47 Fed. Reg. 10,643, §§1-10 (1982). A copy is attached as Exhibit "A" to the Complaint. *See* Brf. in Opp. App. A7.

uncontroverted that the sales were to Indian tribes. Nevertheless, the Commission twice ruled that sales by City Vending to Indian tribes were not exempt from the cigarette stamp tax: that is, that cigarette sales to Indian tribes are not exempt from the Oklahoma cigarette tax.[38]

The Commission's Proposed Assessment

In a letter dated February 2, 1987, Oklahoma mailed John Barrett a $2.7 million proposed cigarette tax assessment[39] for cigarettes sold at the Potawatomi Tribal store. The assessment period was from December 1, 1982 to September 30, 1986. During this period, "the Tribe generated net income of $58,173.00 from the convenience store." Doc. no. 33, pretrial order, p. 9, ¶III-36, filed 6/8/87. The statute of limitations for a proposed tax assessment is three years.[40] Thus, approximately 25% of the proposed assessment (December 1, 1982 to February 1, 1984)[41] was barred, on its face, by the

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[38] The Commission specifically recognizes that sales to tribes are exempt from *sales taxes* under an exemption for "sales to the United States government". However, a Commission administrative law judge has held that a similar cigarette tax exemption [OKLA. STAT. tit. 68, §321 (1981) (cigarette sales "to the United States are hereby exempted from the stamp excise tax")] does not exempt cigarette sales to the Tribe. *In the Matter of the Cigarette Excise Tax of City Vending of Muskogee, Inc.*, Case No. P-85-151 (OTC Sep. 3, 1985); *In the Matter of the Protest of City Vending of Muskogee, Inc. of the Assessment of Tax, Penalty and Interest on Unstamped Cigarette Sales*, Case No. P-86-117 (OTC May 13, 1986). Lodging at 1 *et seq.*.

[39] The actual alleged unpaid cigarette tax was $1,108,413.90. Brf. in Opp. App. A25. The remaining portion of the proposed assessment was for penalty and interest.

[40] OKLA. STAT. tit. 68, §223(a) (1981).

[41] Tax, penalty and interest for December 1, 1982 to February 1, 1984 was $684,130.90. *See* Brf. in Opp. App. A29.

Commission's three-year statute of limitations. In addition, nearly half of the portion of the proposed assessment to Barrett not barred by the statute of limitations included cigarette purchases from City Vending (June 1985 through February 1986)[42] upon which City Vending had already been assessed.[43] Barrett had 30 days from the date of the letter to file a written protest[44] or he, individually, would have been personally liable for nearly $3 million in cigarette taxes. His only connection with the tribal store was that he had been a tribal officer or employee at various times during the assessment period. He had never worked in the tribal store nor sold cigarettes.

The Potawatomis Bring Suit

On February 18, 1987, the Potawatomis filed a complaint in the United States District Court for the Western District of Oklahoma[45] seeking to enjoin this proposed

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[42] City Vending was the Tribe's sole supplier from June 1985 through June 1986. Thus, the proposed assessment period June 1985 through February 1986 represents purchases from City Vending. The proposed assessment and penalty for this period was $650,724.45 or 24.18% of the total. *See* Brf. in Opp. App. A29.

[43] Lodging at 10.

[44] Any effort to assert tribal immunity in such a protest would have been, as City Vending learned, in vain. *In the Matter of the Cigarette Excise Tax of City Vending of Muskogee, Inc.*, Case No. P-85-151 (Okla. Tax Comm. Sep. 3, 1985) (the "Oklahoma Tax Commission is without jurisdiction to determine the constitutional issues . . . " at p. 7, ¶ 2). Lodging at 6.

[45] Original jurisdiction was premised on Act of Oct. 10, 1966, 80 Stat. 880 (codified at 28 U.S.C. §1362). *See* Brf. in Opp. App. A2. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 474 (1976).

assessment, submitting to the district court's jurisdiction "for the sole and limited purpose of securing equitable relief", to-wit: a judgment enjoining Oklahoma "from enforcing or attempting to enforce its regulatory and taxing authority **to assess a cigarette tax** against" the Potawatomis or their "officers, agents or employees". *See* Brf. in Opp. App. A2, ¶1 (emphasis added). The Potawatomis also filed a motion for a preliminary injunction pending the trial court's ruling on the merits.

In a response filed February 23rd (the day of the hearing on the Potawatomis' motion for temporary injunction), the Commission represented that it intended to revoke the proposed assessment against Barrett and to re-issue the same proposed assessment against the Tribe "for State cigarette excise taxes due on the sale of cigarettes sold at the Gallery Trading Post".[46] Based on that representation, the Potawatomis were substituted as the subject of the proposed assessment. After the hearing, the Potawatomis' motion was granted and the Commission was temporarily enjoined from pursuing the proposed cigarette tax assessment against the Potawatomis.

Thereafter, the Commission answered and counterclaimed seeking declaratory relief and damages "pursuant to Rule 18(a)[47] of the Federal Rules of Civil

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[46] Doc. no. 6, response to plaintiff's motion for preliminary injunction, p. 2, filed 2/23/87.

[47] This rule allows joinder of ancillary claims. The Commission did not cite Fed. R. Civ. P. 13. Thus, the Commission's representation that the "State answered and brought a counterclaim . . . pursuant to Rule 13(a) and Rule 18(a)" is not

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Procedure". See Brf. in Opp. App. B5, ¶II.A. The Commission alleged that the Potawatomis sold "cigarettes within the State of Oklahoma to the general public upon which state cigarette excise tax and **sales tax** has not been paid" and that these actions were "in violation of the state's laws and the federal common law as set forth in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)". Brf. in Opp. App. B5, ¶II.C. (emphasis added). The Commission asked the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma has jurisdiction to tax Potawatomi sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted. *See* Brf. in Opp. App. B6.

In alleging that the Potawatomis failed to collect "sales taxes" on cigarettes and praying for related relief, the Commission inserted an issue for which no underlying controversy existed, to-wit: the Commission has never sought to license or assess the Potawatomis for sales taxes. Further, most of the cigarette sales listed in the proposed assessment would have been "specifically exempted" from the Oklahoma sales tax.[48] The

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precisely accurate. *See* Brf. 4; *see also* Sol. Brf. 4 ("The Commission then filed . . . a counterclaim for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 13(a).").

[48] OKLA. STAT. tit. 68, §1355(B) (1981); *see also id.* at §302. In 1984, the Oklahoma cigarette tax code was amended and

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Potawatomis' motion to dismiss this counterclaim was denied. *See* Brf. in Opp. App. C1.

The matter was submitted upon stipulated facts and briefs. Thereafter, the district court held that the Potawatomis were "immune from liability for the assessment" and "permanently enjoined [the Commission] from collecting any state sales taxes against and/or collecting any state sales taxes from" the Potawatomis. *See* Pet. App. A10. However, the district court also granted, in part, the Commission's counterclaim. *Id.* at A9.

Both parties appealed. The Potawatomis appealed those portions of the judgment premised on the Commission's counterclaim. The Commission appealed from the portion of the judgment which enjoined the proposed tax assessment and declared sales of cigarettes to tribal members exempt from Oklahoma cigarette taxes.

The Tenth Circuit found that the District Court erred in denying the Potawatomis' motion to dismiss the Commission's counterclaim and reversed and remanded the case with instructions to dismiss the counterclaim for entry of "an injunction as prayed for by the Potawatomis".[49] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th

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cigarette sales thereafter were subject to the cigarette excise tax and to the sales tax. 1984 Okla. Sess. Law 551, 555 (eff. Apr. 21, 1984). *See also* OTC Rule 13.014.04 (Mar. 10, 1989).

[49] Thus, the Solicitor is engaging in hyperbole in stating that the Court of Appeals "**ordered** the entry of **broad** injunctive relief in favor of the Tribe." Sol. Brf. 18 (emphasis added).

Cir. 1989), cert. granted *sub nom., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 37 (1990).

Following these instructions, the Potawatomis moved the District Court to enter an injunction consistent with the mandate. The Commission did not oppose this motion and a permanent injunction was entered January 4, 1990 enjoining the Commission "from enforcing or attempting to enforce its taxing authority to assess a cigarette tax against" the Potawatomis. *See* Brf. in Opp., App. D1 (emphasis added).

The Commission petitioned this Court for review by certiorari which was granted October 1, 1990.

SUMMARY OF ARGUMENT

This case is about a proposed state cigarette tax assessment against an Indian Tribe. It is not about Indian Country, nor about seizing cigarettes bound for an Indian Tribe, nor about criminally prosecuting a person for selling unstamped cigarettes.

The Commission has no authority to assess an Indian tribe with a tax. Accordingly, the District Court and the Court of Appeals correctly granted the Potawatomis' request to enjoin the Commission's proposed tax assessment.

When an Indian tribe seeks injunctive relief from an unlawful, proposed state tax assessment, a state cannot pursue a counterclaim against the Tribe unless an independent basis exists for federal jurisdiction. The doctrine

of sovereign suit immunity precludes the Commission from pursuing such a counterclaim against the Potawatomis. The Commission did not have the authority to assess the Tribe with a tax. Thus, the Commission was engaged in an illegal act which was properly enjoined. There is no independent basis for jurisdiction to litigate any issue alleged in the Commission's counterclaim. Accordingly, the Court of Appeals was correct in reversing the District Court and ordering the dismissal of the Commission's counterclaim.

ARGUMENT

The precise relief sought by the Tribe was a judgment that permanently "enjoins . . . [Petitioner Oklahoma Tax Commission] from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority **to assess** a cigarette tax against plaintiff".[50]

The relief granted by the Tenth Circuit is clear and precise: "REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis". *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Com'n*, 888 F.2d at 1307.

[50] See Brf. in Opp. App. A7 (emphasis added).

The permanent relief granted[51] by the district court is likewise clear and precise, to-wit: Oklahoma is permanently enjoined "from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority **to assess** a cigarette tax against the Tribe".[52]

Through its counterclaim, the Commission sought sweeping affirmative relief against the Tribe, including an order declaring that the Commission has jurisdiction to tax Potawatomi sales. All of the affirmative relief sought by the Commission was based upon hypothetical questions. The only actual controversy was the Commission's proposed tax assessment of the Potawatomis for unpaid *cigarette* taxes. Thus, *the only issue* here is whether or not the Commission can assess an Indian tribe with a tax.

[51] The permanent injunction entered was the same as the original judgment with two exceptions: (1) the counterclaim relief was deleted and (2) the Potawatomi injunctive prayer was added. Thus, the permanent injunction also contains the language from the original judgment that permanently enjoined the Commission "from assessing the state sales taxes against and/or collecting any state sales taxes from plaintiff". The question of state "sales taxes" was never raised by the Potawatomis other than to point out that the Commission exempts the Potawatomis from paying sales taxes. See e.g. Brf. in Opp. App. D8, ¶ 10. The question of taxing sales by the Potawatomis was raised in the Commission's counterclaim. See Id. at B6, ¶ E.3. This sentence in the permanent injunction is a verbatim repetition of a sentence in the original judgment which was added, *sua sponte*, by the district court. See Pet. App. A10. It was simply repeated when the permanent injunction was entered after remand with no objection from the Commission.

[52] Brf. in Opp. App. D10 (emphasis added).

PROPOSITION I

ABSENT CONGRESSIONAL AUTHORIZATION, STATES HAVE NO POWER TO TAX INDIAN TRIBES.

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indian's exemption from state taxes lifted **only when Congress has made its intention to do so unmistakably clear**.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985) (emphasis added); *see also Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 376-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. at 480-82; *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-81 (1973). Despite the Commission's claim to the contrary (Brf. 37.), Chief Justice John Marshall's statement that the "power to tax involves the power to destroy"[53] has not lost any validity because of the passage of time. The Potawatomis' experience[54]

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[53] *McCulloch v. State of Maryland*, 4 Wheat. (U.S.) 316, 429 (1819).

[54] When the Potawatomi's lands were allotted in Kansas, the state taxing power was used to destroy Indian property rights. "Even though the law stated the land [allotted for the Potawatomis] was exempt from taxation until patent in fee simple was granted, the law was not enforced. Kansas officials assessed and collected taxes on many of these lands illegally and worst of all, after loss of his [sic] annuities, many Potawatomi land holders were hard-pressed for cash. They could then be easily coerced into selling their allotments at ridiculously low prices. Once an allottee had sold his land he

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– including this proposed assessment – proves the truth of Justice Marshall's observation.[55] Not even the federal government taxes an Indian tribe.[56] It is clear that the Commission's action which precipitated this suit (proposing a tax assessment against the Tribe) was patently illegal [*Montana, supra* p. 765] and thus properly enjoined.

PROPOSITION II

THE COMMISSION'S COUNTERCLAIM IS BARRED BY TRIBAL SOVEREIGN IMMUNITY.

The Court of Appeals correctly held that the Commission's counterclaim is barred by the Tribe's sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*

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was virtually in a vagrant status. As a non-land owner with none of the benefits of reservation Indians, he was adrift, without home, identity, or means of support." Horton, *supra* pp. 32-33. "[State] [t]axation was perhaps the most important single factor in the undoing of the Potawatomi allotees" in Kansas which led to their search for a home free of state jurisdiction in Indian Territory. Rev. J. Murphy, O.S.B., *Potawatomi of the West* 291 (1988).

[55] "A definite pattern of results was relatively certain: taxation, loss of land from delinquent taxes, white incursions, widespread alienation of land, and poverty-stricken, dispossessed Indians." Murphy, *supra* p. 285.

[56] Indian tribes are not taxable entities under the Internal Revenue Code. Rev. Rul. 67-284, 1967-2, c.b. 55, 58; Memo. Sol. Int., May 1, 1941, reprinted in 1 Opinions of the Solicitor of the Dept. of the Interior Relating to Indian Affairs 1917-1974, at 1044 (Wash.: Gov't. Printing Ofc., N.D.).

v. Martinez, 436 U.S. 49, 58 (1978) citing *Turner v. U.S.*, 248 U.S. 354, 358 (1919); *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-173 (1977). A State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of sovereign immunity to all civil causes of action, because such a condition would "invite[] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-891 (1986).

Tribes are "domestic dependent nations," *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), exercising inherent sovereign authority over their members and territory. *See Duro v. Reina*, 495 U.S. ___, 110 S.Ct. 2053, 2060-2061 (1990); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Berthold Reservation*, 476 U.S. at 890; *see also U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n. 10; *U.S. v. State of Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

Longstanding Congressional policy strongly supports tribal immunity as well. Congress has a statutory policy of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). Congress repeatedly has approved and decreed the established principle that Indian tribes are immune from suit.

Tribal sovereign suit immunity is only "subject to the superior and plenary control of Congress." Only Congress, therefore, may authorize suits against Indian tribes. *Santa Clara Pueblo*, 436 U.S. at 58. Any waiver of a Tribe's sovereign immunity can **only** be by Congress and may not be implied; it must be unequivocally expressed. *Ibid.*

The Commission concedes that Indian tribes have sovereign suit immunity and that only Congress can authorize suit against Indian Nations. Brf. 28-29. And, the Commission does not suggest that Congress has enacted a law authorizing suit here. Thus, the Commission admits that it has no authority for its counterclaim against the Potawatomis. Nevertheless, the Commission sidesteps the acknowledged authorizing body for suit – Congress – and asks this Court to "strike down the Tribe's immunity defense". *Id.* at 29. The Commission's rationale for urging this radical solution upon the Court is that the Commission must have "the ability to enforce" its tax laws in court. "A right implies a remedy since a right without a remedy is no right at all", argues the Commission. *Ibid.* The Commission's arguments highlight the pitfalls inherent in judicial attempts to act in areas reserved for Congress.

The Commission does not suggest that the Potawatomis consented to the Commission's broad counterclaim.[57] Likewise, there is no basis for concluding that

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[57] The breadth of the Commission's counterclaim reaches far beyond the proposed tax assessment at issue. The counterclaim was filed "pursuant to Rule 18(a) of the Federal Rules of Civil Procedure." Brf. in Opp. App. B5, ¶ II.A. Through this

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the Tribe's narrow suit, brought solely for injunctive relief against the Commission's proposed direct assessment of the Potawatomi for back taxes, voided the Tribe's sovereign immunity by operation of law.[58]

In *U.S. Fidelity & Guaranty Co.*, this Court held that sovereign immunity barred a cross-claim against a Tribe, because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.7. The Court of Appeals adhered to this rule. (Pet. App. A3-A4). It would not permit the Commission's counterclaim to be filed in response to the Tribe's limited suit to prevent a proposed assessment of back taxes for sales of cigarettes in Indian Country. *See Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), rev'd on other grounds, 474 U.S. 9 (1985); *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F.Supp. 1339,

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Rule, the Commission strove to bring before the Court hypothetical issues: questions which were not implicated by either the Commission's proposed assessment of the Tribe, nor by the narrow relief requested by the Tribe to enjoin the proposed assessment of past taxes.

[58] Fed. R. Civ. P. 13 – which the Commission now cites – does not purport to dispense with a Tribe's sovereign immunity. *See* Advisory Commission Note 5 to Rule 13 (counterclaim provisions subject to admonition in Fed. R. Civ. P. 82 that Rules not be construed to extend district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore cannot overcome tribal immunity. *See* 28 U.S.C. 2072(b) (1990) (rules "shall not abridge, enlarge or modify any substantive right.").

1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).[59]

The Commission recognizes that its counterclaim is barred.[60] Nevertheless, the Commission invites the Court to reconsider the doctrine of sovereign immunity. The Court should decline this invitation. Nothing in this case suggests that any abrogation of tribal sovereign immunity is appropriate. As the Solicitor General correctly states: "this Court has repeatedly held that only Congress may dispense with a tribe's sovereign immunity."[61] This tax assessment case provides no reason for this Court to reexamine its own precedents affirming that principle. The Commission does not invoke any rights conferred on it by an Act of Congress. Its counterclaim arises solely under *state* law. "In the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes*, 476 U.S. at 891.

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[59] The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. *See* Pet. App. A4. Equitable recoupment is a defense to a suit for monetary relief that permits the defendant to offset the award in favor of the plaintiff by an amount the plaintiff owes to the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. *See U.S. v. Dalm*, 110 S.Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n. 6, (citing *Bull v. United States*, 295 U.S. 247 (1935)).

[60] The Commission concedes that *U.S. Fidelity & Guaranty* and *Puyallup* furnish "compelling" support for tribal immunity. (Brf. 29, 31-32).

[61] Sol. Brf. 16.

The Commission should not be permitted to access the federal judicial system via an illegally-proposed tax assessment against an Indian tribe. To do so would reward the state for lawless behavior and effectively foreclose the federal courts as a vehicle for Indian tribes to protect themselves from state predatory behavior.

The Court of Appeals properly ordered the dismissal of the Commission's Rule 18 counterclaim.

Response to Brief of the Oklahoma Tax Commission

The Potawatomis here separately respond to the brief of the Petitioner because the Commission has not addressed the issues decided by the Court of Appeals. Rather, the Commission proceeds as if it had filed a lawsuit below to establish that reservations had been abolished when Oklahoma became a state. This "new lawsuit" is not premised on the federal laws which authorized statehood for Oklahoma nor on the Constitution of Oklahoma. Rather, it is premised upon written reports filed by the so-called Dawes Commission.

The Commission concedes that only Congress, not the judiciary, has power over Indian Tribes and Tribal land.[62] Nevertheless, the Commission urges the judiciary to 'enact' laws so that the Commission can tax Indian tribes.[63] The Commission urges this Court to find that

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[62] Brf. 16-17. "[A]uthority over the tribal relations has been exercised by Congress from the beginning . . . not subject to be controlled by the judicial department" citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

[63] *E.g.* "[T]hese conflicts should be resolved by the Judicial Department of the Government." Brf. 29.

"state taxes are applicable to the Tribe's sales . . . because there are no reservations in Oklahoma." Brf. 5. According to the Commission, without reservations the Tribe has no "magical power to extinguish state laws like a legal kryptonite". *Id.* at 21.

Whether the Potawatomis have a reservation, or even own land, is irrelevant. The Commission acknowledges that the Potawatomis are an Indian tribe. As such, the Potawatomis cannot be assessed taxes by the Commission. The Commission's arguments regarding reservations in Oklahoma do not warrant consideration because the Commission cannot pursue its counterclaim.

Response 1: The Dawes Commission did not extinguish Indian Country in Oklahoma.

The Commission argues that the "several cession agreements and the work of the Dawes Commission in the years prior to statehood disestablished the reservation system in Oklahoma and Congress has since that time intended that no reservations be re-established." Brf. 5. The Dawes Commission reports are the linchpin for the Commission's argument that Indian "reservations" have never existed in Oklahoma.[64]

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[64] The Commission does cite the *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Brf. 6. However, this case was not a suit by an Indian Tribe and has no factual similarities to the underlying controversy here. It was a suit by three individual Indians who were members of the Five Civilized Tribes. The dispute was over whether or not Oklahoma inheritance taxes applied to "cash and securities" restricted under a

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The Dawes Act (Indian General Allotment Act),[65] like other allotment acts which preceded and followed it, authorized the taking of Indian lands by force under the pretext of helping the Indians.

> [The allotment policy] . . . is not to help the Indian, or solve the Indian problem, or provide a method of getting out of our Indian troubles so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement . . . The provisions for the apparent benefit of the Indian are but the pretext to get at its lands and occupy them. With that accomplished, we have surely paved the way for the extermination of Indian races upon this part of the continent. If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.

U.S. Congress, Committee on Indian Affairs, "Lands in Severalty to Indians: Report to Accompany H.R. 5038" H. R. Rep. 1576, 46 Cong., 2d Sess. (May 28, 1880), pp. 7-20. The Dawes Commission was created in 1893 long *after* the

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federal statute concerning Indians of the Five Civilized Tribes. *Id.* at 604 fn. 6. The Indian lands were held to be exempt from inheritance taxes. *Id.* at 612. In deciding that the "cash and securities" were not exempted by the federal statute, the Court noted that Congress authorized federal estate taxes of individual Indians. *Id.* at 608. As pointed out earlier (fn. 56 *supra*), the federal government does not recognize Indian tribes as taxable entities.

[65] Feb. 8, 1887, ch. 119, 24 Stat. 388.

Potawatomis' land had been allotted.[66] The Dawes Commission was established to overcome the refusal of certain tribes to give up their lands.[67] Specifically, the Dawes Commissioners were to negotiate with the Five Civilized Tribes "for the allotment in severalty of their lands and for the extinguishment of their tribal government, 27 Stat. 612, 645 Sec. 16". *U.S. v. Magnolia Petroleum Co.*, 110 F.2d 212, 215 (10th Cir. Okl. 1939). Their reports are suspect, *inter alia*, because of what was later learned about the men on the Dawes Commission, to-wit: that virtually all were involved in *sub rosa* Indian land speculation in Oklahoma.

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[66] Allotment of Potawatomi lands began in 1872. 17 Stat. 159 (May 23, 1872). However, allotment *and* "purchase" of "surplus" lands (approximately 265,242 acres, or a little less than half of the reservation lands) began June 25, 1890 [28 Stat., 1016] and ended when the "surplus land" was opened to non-Indian settlement in a run on September 22, 1891. 27 Stat. 989 (Sept. 18, 1891). Although the Potawatomi lands were allotted, in part, under the Dawes Act, the allotments had nothing to do with the Dawes Commission. The 1891 Potawatomi allotment agreement was negotiated by the Jerome Commission.

[67] *E.g.* "[T]he Dawes Commission reports . . . contain insightful [sic] commentary on the corruption of tribal governments, the lamentable failure of the reservation system, the difficulties . . . in tribal negotiations." Brf. 15. "These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the conditions and sentiments of the Indians and in a high moral turn urge the abolition of their institutions as a deliverance to *them*. Greed, philanthropy, and public opinion were thus united to break down the Tribe's defenses. What might have been advocated as a measure of cold-blooded realism was represented as a holy crusade." A. Debo, *A History of the Indians in the United States* 307 (Univ. of Okla. Press: Norman & London 1988). Compare fn. 10, *supra*.

> Every member of the Dawes Commission and nearly every high Interior Department official in the territory was credited with stock in one or more of these companies [companies speculating in Indian land], and most of them were listed as officers and directors; and apparently almost everyone down to the humblest clerk in a government office had purchased a share. . . . It will probably never be known to what extent the private investment of federal officials in land companies may have influenced them to condone the plundering of Indian lands.

A. Debo, *And Still the Waters Run*, pp. 118, 120 (N.Y. Guardian Press, Inc. 1966). Whatever the significance of the Dawes Commission reports, they relate solely to the Five Civilized Tribes who were exempted from the Dawes Act.[68]

Response 2: The Potawatomi Lands in Oklahoma are Indian Country.

The Commission asserts that since statehood, no "reservations" have existed in Oklahoma. The Commission makes this argument without reference to the federal statutes which authorized statehood for Oklahoma or the Oklahoma Constitution. These laws contained specific

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[68] Feb. 8, 1887, ch. 199, 24 Stat. 388, at 391 (section 8). The Five Civilized Tribes were allotted under the subsequently-enacted Curtis Act [June 28, 1898, ch. 517, 30 Stat. 495. The Curtis Act was repealed by the Oklahoma Indian Welfare Act. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446, 271 U.S. App. D.C. 212, cert. denied *sub nom., Hodel v. Muscogee (Creek) Nation*, 488 U.S. 1010 (1989)] and the Five Civilized Tribes Act [Apr. 26, 1906, ch. 1866, 34 Stat. 137].

language by which Oklahoma "forever" disclaimed any jurisdiction over Indian lands.

The Commission's focus on the word "reservation" is misplaced. The operative term of art for lands over which an Indian Tribe has jurisdiction is "Indian Country": land "validly set apart for the use of the Indians as such, under the superintendence of the Government". *United States v. Pelican*, 232 U.S. 442, 449 (1914). The Court of Appeals correctly held that lands within the Potawatomis' original reservation boundaries, held in trust by the federal government for the benefit of the Tribe, are "Indian Country" and, for the purposes of the statutory definition of Indian Country [18 USCA §1151(a)] are a "reservation". *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d at 1305-6.

Oklahoma's jurisdiction, or lack thereof, is not determined by the word "reservation". The Constitutional limitation on Oklahoma's jurisdiction refers to "all lands . . . owned or held by any tribe". Okla. Const. art. I, §3. Whether the Potawatomi lands in question are still part of a reservation or not, they are – and always have been – lands "owned or held" by a "tribe" and, Oklahoma has disclaimed jurisdiction over them. *See Yellow Cab Transit Co. v. Johnson*, 48 F.Supp. 594, 598-9 (W.D. Okl. 1942), affirmed *sub nom., Johnson v. Yellow Cab Transit Co.*, 137 F.2d 274 (10th Cir. 1943), affirmed, 321 U.S. 383 (1944) (lands subject to Article I, §3 were "never a part of, or under the jurisdiction of, the Territory or State of Oklahoma, except as such jurisdiction has been specifically ceded to the State by Congress").

Response 3: *Moe* did not authorize state tax assessment of an Indian Tribe.

The Commission argues that this Court's decision in *Moe* controls the outcome of this case. First, *Moe* does not authorize a state to tax an Indian tribe for cigarette taxes. Second, *Moe* is only implicated in connection with allegations made in the Commission's counterclaim.[69] Because the Commission's counterclaim was properly dismissed, consideration of *Moe* is not necessary or appropriate here.

The Commission controlled how this dispute arose by proposing a tax assessment against an Indian tribe – the Potawatomis – for *cigarette* sales. No other factual controversy is properly before this Court.[70]

The Solicitor General suggests that the Commission's "power to tax cigarettes sales to non-members is properly before the Court because it is subsumed in the question of whether the state may assess the Tribe for taxes due on such sales." Sol. Brf. 8. The Commission's power to tax cigarette sales to non-tribal members is not before this Court. It is not and cannot be "subsumed" in the question

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[69] "C. That said actions of the plaintiff are in violation of the . . . federal common law as set forth in *Moe* . . . " Brf. in Opp. App. B5.

[70] The Commission has never proposed a tax assessment for unpaid *sales* taxes. Sales taxes were injected in this lawsuit by allegations in the Commission's counterclaim. "B. That plaintiff has sold and continues to sell cigarettes . . . upon which State . . . sales tax has not been paid." Brf. in Opp. App. B5. *See also Id.* at B6, E.5. Because no factual dispute existed over the collecting or paying of any sales taxes, this portion of the Commission's counterclaim should have been dismissed, in any event, for lack of an actual controversy. 28 U.S.C. §2201.

of whether the Commission can assess the Tribe with cigarette taxes. All parties concede that the Tribe is immune from tax and that the only measure taken by the Commission was to tax the immune entity – the Tribe – via a proposed tax assessment. What other measures may have been available to the Commission, and the legal issues surrounding such hypothetical measures, are not properly before this Court.[71]

The Solicitor supports its suggestion regarding the issues before the Court for review by referencing the District Court's Order:

> The District Court not only enjoined the assessment; it also enjoined the Commission 'from collecting any state sales taxes on purchases by members of the [Tribe]' and denied what it understood to be the Tribe's 'request' for 'further permanent injunctive relief as to collection of state sales taxes on purchases by non-members'. *Ibid.* These portions of the judgment address collection of state taxes on future as well as past sales.

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[71] The Solicitor seems intent on litigating hypothetical questions by suggesting that the Court of Appeals be asked "to consider what measures the state might take to enforce its tax laws if those laws do apply to some such sales, and it is not clear what measures the Commission would propose to take." Sol. Brf. 18. The Potawatomis asked the District Court to enjoin a proposed tax assessment. That is the only factual controversy that exists between the parties. That factual controversy was unilaterally defined by the Commission. Had the Commission wanted answers to other questions about what it might or might not do, it should have taken actions consistent therewith. It did not. These hypothetical questions are inappropriate. U.S. Const. art. III, §2; *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-241 (1937).

Sol. Brf. 19-20. However, the first section of the District Court's order concerned a matter not in dispute, to-wit: the Commission recognizes that sales to the Tribe are not subject to the Oklahoma sales tax laws under a statutory exemption for "Sales to the United States Government".[72] The Tribe never prayed for any relief relating to sales taxes nor would this have been necessary. No controversy existed between the parties regarding sales tax.[73] The second portion of the Solicitor's quote from the District Court order also concerns relief never requested by the Tribe. It was entered *sua sponte* by the District Court to fashion an order that responded to the Commission's assertion in the counterclaim that *Moe* controlled.

Moe would not be controlling even if a similar factual controversy existed here, that is, if the Commission had arrested a Potawatomi employee at the Tribal Store for selling cigarettes not bearing Oklahoma tax stamps.[74] This is true not just because of Public Law 280, but because of Oklahoma's absence of territorial jurisdiction over Indian lands.

Response 4: Oklahoma has no territorial jurisdiction over Indian lands.

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[72] OKLA. STAT. tit. 68, §1305(i) (1971). *See* fn. 38, *supra*.

[73] "[T]he Tribe itself not only is exempt from payment of state sales taxes (such exemption is recognized and acknowledged by the defendants in pleadings to this Court) . . . " Pet. App. A19 (Dist. Ct. Order filed 4/15/88).

[74] *Moe*, 425 U.S. at 467 ("Deputy sheriffs arrested Wheeler [who sold cigarettes on trust land for his own benefit] and an Indian employee for failure to possess a cigarette retailer's license and for selling non-tax-stamped cigarettes, both misdemeanors under Montana law.").

The concept of "jurisdiction" is a cornerstone of common law jurisprudence. It confines government exercise of power to those matters actually committed to government and over which government has lawfully extended its powers. "The foundation of jurisdiction is physical power . . . " *McDonald v. Mabee*, 243 U.S. 90, 91 (Holmes, J.) (1917). Thus, the general rule has been consistently applied that a state may not tax persons, property or interests which are not within its "territorial jurisdiction". *James v. Dravo Contracting Co.*, 302 U.S. 134, 138 (1937). This general rule includes sales taxes. *Straughn v. Kelly Boat Service, Inc.*, 210 So.2d 266, 267 (Fla. App. 1968) (Florida "had no power or jurisdiction to levy and collect taxes on" transactions occurring outside three-mile limit because beyond Florida territorial jurisdiction). This means that the event which is subject to the tax (*i.e.* the sale or transfer of possession) must occur in the territory of the taxing authority. This concept is recognized in the Commission's stamp excise tax law. ["There is hereby levied upon the sale . . . of cigarettes *within* the State of Oklahoma, a tax . . . " OKLA. STAT. tit. 68, 302 (1990 Supp.) (emphasis added) Compare Enabling Act on page 6, *supra* ("without the limits of said state")]. *See American Bridge Co. v. Smith*, 179 S.W.2d 12, 15 (Mo. 1944), cert. denied, 323 U.S. 712 (1944).

This doctrine can be illustrated by the following analogy. Suppose Maine sought to compel Canada to collect Maine taxes on sales in Canada. The "minimal burden"[75] on Canada of collecting Maine taxes would not give legal sanction to Maine's efforts. Absent a treaty, states have no legal right to compel Canada or any other country or

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[75] The standard articulated in *Moe*, 425 U.S. at 483.

sovereign to collect that state's taxes. Absent federal authorization, states likewise cannot expect other states to be tax collectors. The same holds true of state taxation in Indian Country. Absent a federal statute giving states jurisdiction in Indian Country, state laws and powers to tax have no effect in Indian Country. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

Territorial jurisdiction is a prerequisite to the taxing power. *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 342 (1954). "The state cannot legislate effectively concerning matters beyond her jurisdiction and within territories subject only to control by the United States." *Standard Oil Co. v. People*, 291 U.S. 242, 244-5 (1934).

This basic concept precludes the Commission from relying on the trilogy of cases[76] which have recognized the power of the state to impose a cigarette tax on sales of cigarettes to non-tribal members in Indian Country. In each of these decisions, the state seeking to impose the cigarette tax had some territorial jurisdiction within Indian Country.[77] The Commission cannot cite any

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[76] *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

[77] In *Chemehuevi*, California was given limited criminal and civil jurisdiction over all Indian Country. *See* 28 U.S.C. §1360; *Colville, supra* p. 164, fn. 32 ("the Colville Tribe consented in 1965 to the state's assumption of jurisdiction."). In *Colville*, the Colville Tribe offered to come under state jurisdiction pursuant to Public Law 280. Wash. Rev. Code Ann.

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authority for exercising territorial jurisdiction in the Potawatomis' Indian Country. As shown above, the reports of the Dawes Commission are certainly not valid authority.

The Solicitor suggests that "the State's authority to tax cigarette purchases by non-members in *Moe, Colville* and *Chemehuevi* was not acquired pursuant to – but rather *existed independently* of – Public Law 280."[78] Sol. Brf. 23 (emphasis added). This *may* have been true in Montana, Washington, and California, but it is *not* true in Oklahoma. Where is the authority for the proposition that Oklahoma has territorial jurisdiction in Indian Country?

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§§37.12.010-37.12.070; *Tonasket v. State*, 525 P.2d 744, 746 (Wash. 1974) ("in January of 1965, the Colville Business Committee issued resolution 1965-4 requesting the State of Washington assume criminal and civil jurisdiction over the Colville Tribe and reservation . . . [The government] issued a proclamation assuming, on behalf of the state, the requested jurisdiction which the state has since exercised."). In *Moe*, Montana had assumed jurisdiction over Indian Country consistent with Public Law 280. *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1306 (D. Mont. 1975) ("Pursuant to P.L. 280, 67 Stat. 588, . . . the State of Montana assumed complete criminal and limited civil jurisdiction over Indians residing on the Flathead Reservation.").

[78] The drafters of Public Law 280 did *not* – as to Oklahoma – recognize any such "independently" existing jurisdiction. On the contrary, Congress acknowledged that in Oklahoma, Indian "lands were to remain under the ***absolute*** jurisdiction and control of the Congress of the United States" because of Oklahoma's constitutional disclaimer over Indian lands. *See* S. Rep. No. 699, 83rd Cong., lst Sess., reprinted in 1953 U.S. Code Cong. & Admin. News 2409, 2414 (emphasis added).

What is the *law* which gives Oklahoma territorial jurisdiction over Indian lands? Neither the Commission nor the Solicitor provides an answer.

On the contrary, the authorities are ancient and consistent that Oklahoma has no territorial jurisdiction within Indian Country. As the U.S. Supreme Court has stated many times:

> '[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.' *Rice v. Olson*, 324 U.S. 786.

McClanahan, 411 U.S. at 168. This policy is reflected in two themes which have long characterized Indian law. The first is that the federal government has plenary control over Indian tribes;[79] that is, Congress tomorrow could forever and finally terminate the sovereign status of Indian tribes. The second, a corollary to the first, is that absent an exercise of this plenary power by Congress, the Indian tribes retain all of their sovereign rights to the absolute exclusion of the state. *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978); *U.S. v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986).

Unlike the Commission, the State of Oklahoma has long recognized that a grant of authority from the federal government is necessary before the state can exercise jurisdiction in Indian Country.

> Since the beginning, then, it has been judicially developed by the federal courts and administrative officials that only Congress has plenary authority over Indian affairs to limit,

[79] *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977).

> modify or eliminate their powers of self-government. *Talton v. Mayes*, 163 U.S. 376 (1896). In general, then, state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions have been met: Congress has expressly delegated authority to the state or recognized some state power or the question involving Indians involves non-Indians to a degree. . . .
>
> Concerning the State of Oklahoma, **there has been no such Congressional delegation of authority**. To the contrary, federal jurisdiction of Indian lands and affairs were reasserted in the acts of Congress organizing the Oklahoma Territory and preparing the territory for statehood.

10 Op. Att'y. Gen. 464, 465 (Okl. No. 78-176; Jan. 4, 1978) (emphasis added).[80] This general policy is reflected in the federal government's treaties with the Potawatomis and the statutes authorizing statehood for Oklahoma. In authorizing the creation of the Potawatomis' reservation, the U.S. government promised[81] that the reservation lands would "*never* be included within jurisdiction of any state". Treaty of Feb. 27, 1867, United States – Pottawatomie Tribe of Indians, 15 Stat. 531 (emphasis added). Although this promise has been indirectly abrogated (in part) by subsequent federal enactments which

[80] The Attorney General is the "chief law officer" of Oklahoma. OKLA. STAT. tit. 74, §18 (1981). Attorney General's opinions are binding on state officials unless inconsistent with a final determination of a court of competent jurisdiction. *York v. Turpen*, 681 P.2d 763 (Okl. 1984).

[81] "[An Indian] treaty was not a grant of rights to Indians, but a grant of rights from them – a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 381 (1905), *quoted with approval* in *U.S. v. Wheeler*, 435 U.S. at 327 n. 24.

took away most of the Potawatomi reservation lands, it has not been revoked as to those Indian lands still held by the Tribe.[82] In fact, subsequent to the allotment laws, the federal government specifically authorized Indian tribes to recover their reservation lands. Act of June 18, 1934, ch. 576, sect. 3, 48 Stat. 984 (codified at 25 U.S.C. §463).

The federal government, in admitting Oklahoma to the union, consistently required an acknowledgment that the federal government had exclusive jurisdiction in Indian Country.

> That **nothing in this Act shall be construed to impair any right now pertaining to any** Indians or **Indian tribe** in said territory under the laws, agreements, and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights.

Oklahoma Organic Act, May 2, 1890, 26 Stat. 81, §1 (emphasis added).

> That **the people** inhabiting said proposed state do agree and declare that they **forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation**; and that until the title to any such public lands shall have been extinguished by the United States the same shall be

---

[82] Although portions of a treaty may be repealed by implication, the treaty itself is not repealed. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 413 (1968); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938-9 (10th Cir. Okl. 1989).

> and remain subject to the jurisdiction, disposal and control of the United States.

Oklahoma Enabling Act, June 16, 1906, 34 Stat. 267, §3. Oklahoma's constitution follows the Organic and Enabling[83] Acts in recognizing the lack of state jurisdiction in Indian Country.

> The **people** inhabiting the state do agree and declare that they **forever disclaim** all right and title in or to . . . **all lands lying within said limits owned or held by an Indian, tribe or nation** . . . The same shall be and remain subject to the jurisdiction, disposal and control of the United States.

Okla. Const. art. I, §3 (emphasis added). As recently as 1978, the State of Oklahoma through its chief law officer acknowledged this jurisdictional limitation:

> It appears, then, from the face and legislative history of the Congressional acts affecting Oklahoma, the Organic Act and the Enabling Act, that **there was no intent to extend jurisdiction to** Indians, **Indian tribes, or Indian Country** within the territories upon the attainment of statehood.

10 Op. Att'y. Gen. at 467. *Cf. DeCoteau v. District Court for Tenth Judicial District*, 420 U.S. 425, 428 (1975) ("It is common ground here that Indian conduct occurring on the trust allotments is beyond the state's jurisdiction,

---

[83] "And whereas, it appears that the said constitution and government of the proposed State of Oklahoma . . . contains all of the six provisions expressly required by Section 3 of the said Act [Enabling Act] to be therein contained." Proclamation of Statehood, Nov. 16, 1907, no. 6869.

being instead the proper concern of tribal or federal authorities."). "Article I, §3 of the Oklahoma Constitution constitutes a legal impediment" to the exercise of state court jurisdiction in Indian Country. *State v. Little Chief*, 573 P.2d 263, 265 (Okl. Cr. 1978); *see also C.M.G. v. State*, 594 P.2d 798, 799 (Okl. 1979), cert. denied *sub nom., Oklahoma v. C.M.G.*, 444 U.S. 992 (1979).

These limitations on Oklahoma's jurisdiction have been recognized in federal court.

> In the Constitution of the State of Oklahoma ~~[art. III, §1]~~ [art. I, §3], . . . we found the following language: 'The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, * * * .'
>
> It is therefore apparent that the original Fort Sill military reservation **was never a part of, or under the jurisdiction of, the Territory or State of Oklahoma** except as such jurisdiction has been specifically ceded to the State by Congress.

Yellow Cab Transit Co. v. Johnson, 48 F.Supp. 594, 598-99 (W.D. Okl. 1942), affirmed, 137 F.2d 274 (10th Cir. 1943), affirmed, 321 U.S. 383 (1944) (emphasis added); *see also U.S. v. State Tax Comm. of Mississippi*, 412 U.S. 363, 371 (1973) (state cannot require out-of-state vendors to collect and remit state taxes on liquor sold on federal military installations because "nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction"). Although *Yellow Cab* concerned a federal installation on "unappropriated public lands", the section quoted from the Oklahoma Constitution includes lands owned by Indian tribes. Thus, the result should be the same for Indian tribes, a result which, as noted above, has

been consistently supported by the Attorney General for the State of Oklahoma.

Accordingly, the Potawatomis' sales of cigarettes on Indian lands are beyond the territorial jurisdiction of the Commission and not subject to its laws and regulations, including its power to assess taxes.

CONCLUSION

The Court of Appeals was correct in reversing and remanding to the District Court for entry of an order dismissing the Commission's counterclaim and in directing that a permanent injunction be entered against the Commission barring it from *assessing* the Potawatomis with a cigarette tax. Accordingly, the permanent injunction which has now been entered and the Court of Appeals decision which authorized it should be affirmed.

Respectfully submitted,

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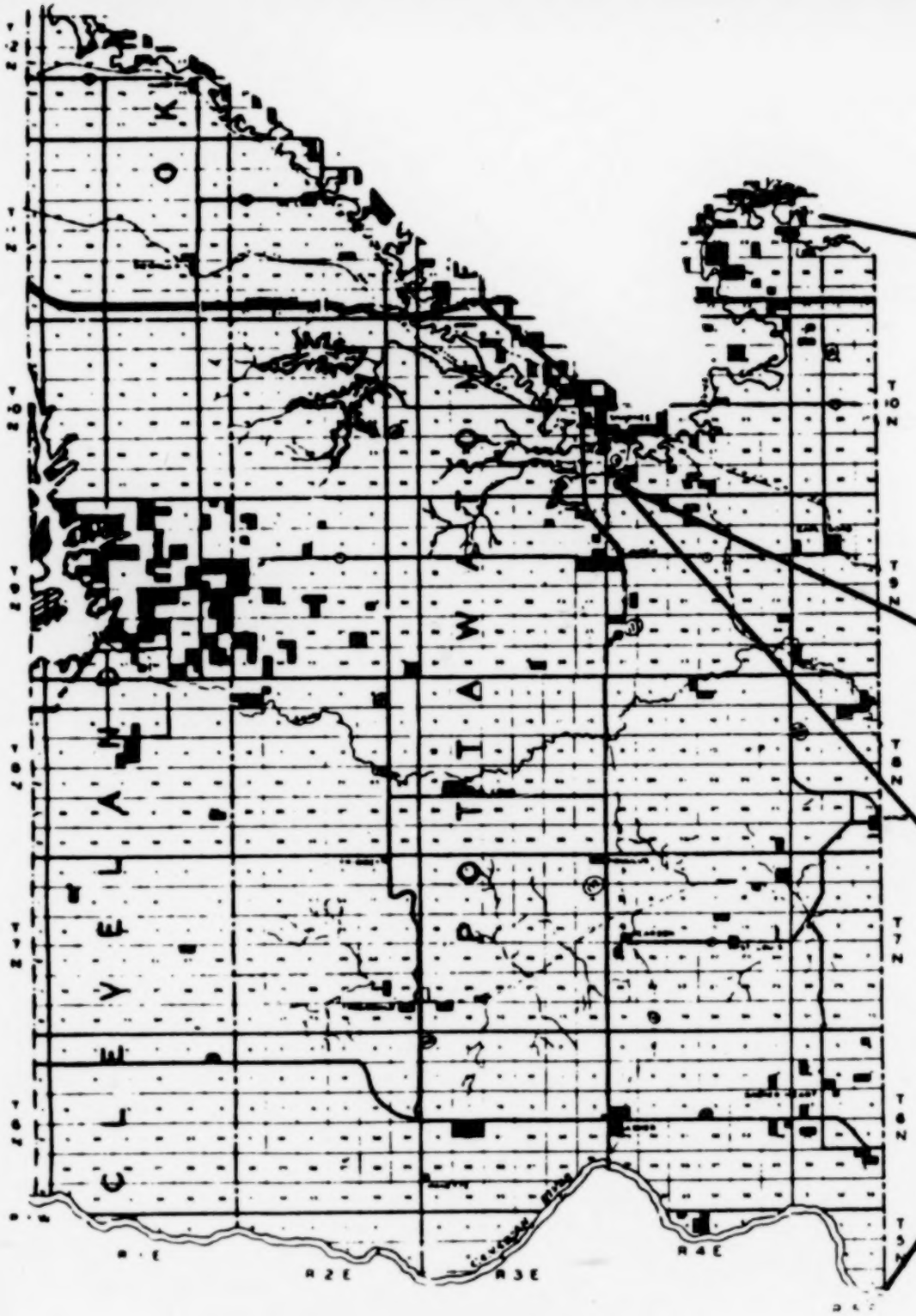
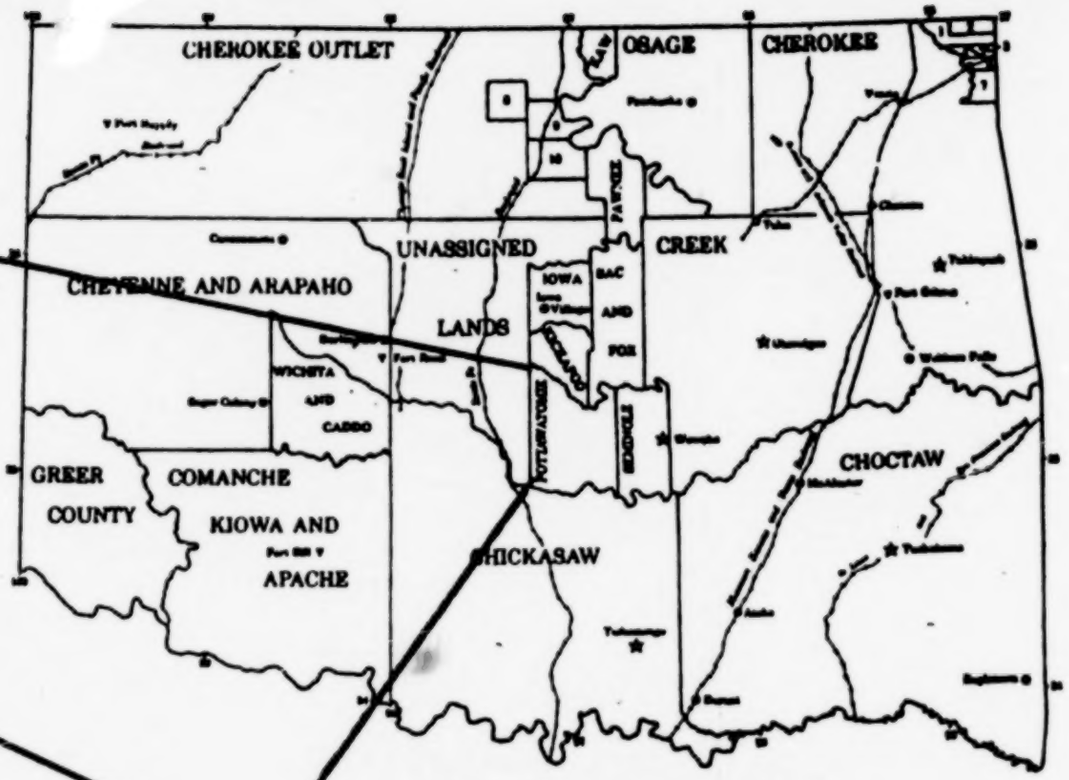
December 12, 1990

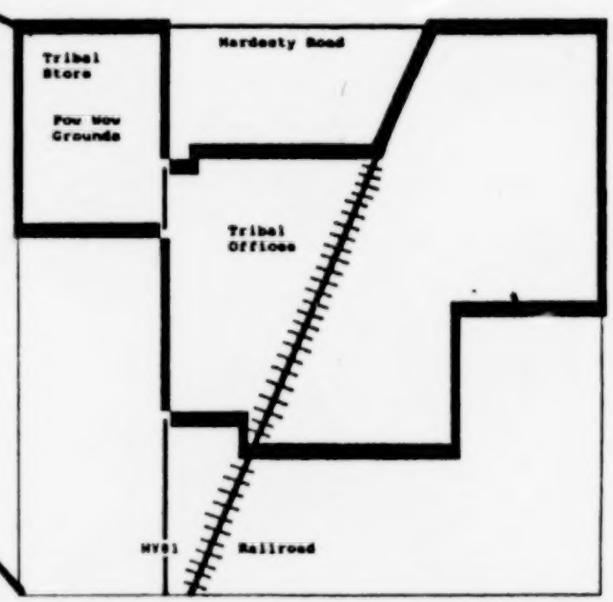


Original Potawatomi Reservation

[Darken areas allotments or Tribal lands]



Indian Territory (1890)



Potawatomi Tribal Lands
In Section 31-T10N-R4E
Exclusive of allotments, about 80%
of Lands now held by Tribe

No. 89-1322

In The

Supreme Court of the United States

October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE OKLAHOMA TAX COMMISSION

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REPLY BRIEF FOR THE OKLAHOMA TAX COMMISSION

I. THE TRIBE IS RESPONSIBLE FOR TAXES THAT IT HAS A DUTY TO COLLECT.

The Tribe asserts in its Brief at page 26 that Indian tribes are not taxable pursuant to *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). Therefore the Tribe concludes that when it sells cigarettes and other goods at its tribal store to the general public, it cannot be held responsible for uncollected state taxes even though it has

a duty to collect those taxes under *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

This interesting theory puts the Tribe in a very convenient position whereby the Tribe will be unresponsible to pay for taxes it forgets to collect even if this Court rules that *Colville* does apply. So, win or lose, the taxes won't get paid. If the Court finds that *Colville* does not apply, the Tribe wins the case and continues to sell untaxed goods to the citizens of Oklahoma. If the Court finds that *Colville* does apply, the Tribe loses the case but still continues to sell untaxed goods since, as a Tribe, it is precluded from paying taxes.

This is not what the Court decided in the *Blackfeet* decision. In *Blackfeet* the State of Montana imposed a tax on the Blackfeet Tribe's royalty interest in oil and gas leases on the reservation. This Court found that the tax was invalid because the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust. The *Blackfeet* case is distinguishable from the case at bar because the cigarette taxes at issue here are imposed on the ultimate consumer or users of cigarettes, see 68 O.S. §302, and not on the tribe. Since the legal incidence of the cigarette tax falls on the consumers of cigarettes purchased from the Tribe's store, the State has the right to require the Tribe to collect the tax on behalf of the State, *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). Under current doctrine, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may

fall on the United States or tribe, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. ___, 109 S.Ct. 1698 (1989).

The practical problem that faces the State in this case is enforcement of the State's right to collect its valid taxes. As the Tribe points out in its Brief at page 17, the State can assess the cigarette tax against a wholesaler who is licensed and doing business in Oklahoma, when that in-state wholesaler sells unstamped cigarettes to an Indian Tribe. Under this method the State has effectively prevented all in-state wholesalers from selling to Indian tribes. However, tribes may still obtain unstamped inventories of cigarettes from out-of-state wholesalers who have no apparent nexus with Oklahoma and are therefore not required to stamp the cigarettes. Also, since the cigarettes are shipped across state lines, the wholesalers' home-state does not require the cigarettes to be stamped. By playing the various state laws against each other, the Tribe can obtain an unstamped cigarette inventory, fail to affix the State stamp, and offer a large "tax-exemption" discount to its customers. There is nothing wrong with the Tribe buying cigarettes out of state, but when those cigarettes are sold in Oklahoma, the State looks to the Tribe to stamp the cigarettes or pay the delinquencies, 68 O.S. §305(b).

The Tribe is fully aware of its duty under the decisions of this Court to collect the State cigarette tax, but is also cognitive of its ability to evade those taxes. The Tribe now complains that after years of such tax evasion, it is now faced with an enormous tax liability that would materially affect the Tribe's financial condition if it is required to pay it. But that is only the natural consequence of the Tribe's decided action to evade valid state

taxes in its business operations. Obviously the duty to pay the tax means nothing if the consequence of not paying the tax is getting away with it. It is therefore reasonable to conclude that if the Tribe practices to evade taxes, it will be snared in a web of tax liabilities.

The Tribe responds evasively to this Court's authority in the trilogy of cases, *Moe*, *Colville* and *Chemehuevi*. First, the Tribe presumes to tell this Court which issues it can review and asserts at page 38 of its Brief that any issues relating to the State's counterclaim are not properly before the Court. The Tribe never attempts in its Brief to give any reasons for its position but seems satisfied in concocting diversionary arguments aimed at disposing of the controlling case law in a superficial basis, in an obvious attempt to avoid the problematic task of dealing with this court's decisions in those cases on a factual basis.

Next, at page 41 of its Brief, the Tribe tries to explain the concept of "jurisdiction." In a display of its boundless arrogance toward State or Federal law on the subject, the Tribe proposes to analogize this case to a situation involving Maine seeking to compel Canada to collect Maine taxes on sales in Canada. You don't suppose Canada would stand for that, do you? Such utterly ridiculous reasoning undermines the whole Brief of the Respondent Tribe. In the *Cotton* case, this Court found that the State and Tribe shared jurisdiction on the reservation and therefore Cotton Petroleum Corp. was required to pay both a state and a tribal tax since its activities occurred both within the State of New Mexico and on the tribal reservation. The Tribes' "foreign nation" theory doesn't hold water. *Cotton* held that the Commerce Clause of the

Constitution is divided into three classes: foreign nations, the several states, and Indian tribes. The Constitutional Convention considered each class as entirely distinct, 109 S.Ct. 1716. Therefore Indian tribes are not treated in the same manner as either foreign nations or States. In terms of this case, the Tribe is operating a business within the State of Oklahoma rather than in a zone without jurisdiction.

The Tribe finally makes its citation to Public Law 280 where it draws the conclusion that *Moe*, *Colville* and *Chemehuevi* do not apply to Oklahoma. The Tribe does not explain how those three cases relied entirely on the basis of Public Law 280 without citing the law. Furthermore, the Tribe ignores the cases that are just too hard to explain away such as *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), where this Court held that Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State, and *Cotton*, supra, where the Court found that questions of preemption in the area of state taxation of lessees of Indian land are not resolved by mechanical or absolute conceptions of tribal sovereignty and state tax laws do extend onto the reservation and apply to non-Indians on the reservation. The Tribe has failed to establish any reason or authority as to why it is immune from the decisions of this Court which mandate that the State tax laws apply to its business.

II. THIS COURT HAS THE POWER TO PREVENT THE UNCONSTITUTIONAL APPLICATION OF THE INDIAN SOVEREIGNTY DOCTRINE.

The State has proposed in its Brief-in-Chief that the sovereign immunity of Indian tribes, upheld in this case

by the Tenth Circuit, should be struck down because of the changing circumstances of today posed between State government administration and the ever expanding scope of tribal governments into the general community of the State which is governed by State law. The immunity doctrine should be abandoned in light of the Tribe's inability or unwillingness to properly limit itself which causes an impermissible burden on the administration of State law in violation of the Tenth Amendment to the Constitution.

The Tribe and the Solicitor General of the United States as *amicus curiae* urge this Court to do nothing; just keep everything the same and whatever you do, don't do anything. Under this plan, the State may have a right but without any ability to sue the Tribe, no power of enforcement which will leave the Tribe in a position to choose not to comply with any law, State or Federal, and be free from any adverse consequences, leaving the State to muddle through or just drop the issue altogether.

This, of course, would allow the Tribe to expand its business operations as it sees fit and leave the State powerless to collect its valid taxes. Of course, the Tribe states that it can think of a lot of ways it will spend its future profits and the Solicitor General is equally unconcerned that State taxes won't get paid since he is a federal employee who receives a federal paycheck and it does not appear that any federal tax revenue is in danger. Besides, the Solicitor is not the tax collecting agent for the State of Oklahoma and any difficulties the State may be experiencing in collecting tax is not his concern.

So it is not surprising that neither the Tribe nor the Solicitor General want to find any solution to this problem. Therefore neither Brief submitted by the Tribe or the Solicitor come up with answers, only excuses why not. The State merely suggests that this case deserves a solution.

The Tribe asserts the longstanding policies of tribal immunity and cites substantial authority of this Court for its position. But the whole point of the State's Brief-in-Chief is that there are equally substantial reasons for this Court to strike down that immunity in this case which the Tribe does not respond to. However, the State points out that this case only regards the sovereign immunity of the Tribe as it relates to the administration of State law. This case does not involve the sovereignty of the Tribe in its own Courts and over its own internal and social relations which would still be maintained. Also, this case does not involve the Tribe's immunity from suit of private individuals or companies who may deal voluntarily with the Tribe with full knowledge of its immunity. This case deals with a state, a sovereign in its own right, and with administration of state law on a tribal business, not a consensual relationship.

But the Solicitor contends in his Brief at page 10 that if Indian tribes were subject to suits without their consent, scarce tribal resources would be exposed to the expense of litigation and adverse money judgments, which could deprive the Tribes of their ability to furnish necessary services to their members. However, the prospect of litigation and adverse judgments are the ordinary and intended consequences of violating State and Federal laws. These consequences can be avoided by paying the

applicable taxes or complying with applicable laws. The Tribe could have avoided this lawsuit but chose not to. The Tribe is just as able as anyone else to realize the consequences of its choices. There is no reason why the State should carry the burden of the Tribe's wrongful act just because this lawsuit is an inconvenience to the Tribe. Furthermore, the possibility that the Tribe might be deprived of its ability to furnish services to its members is lessened by the fact that the Tribe merely dispenses those services as a conduit of federal programs which would exist independently of the Tribe and probably would exist with less bureaucracy without the Tribe.

But the most challenging and able argument proposed by the Solicitor and the Tribe against the State's position is that tribal sovereignty is subject only to the superior and plenary control of Congress, and Congress has failed to act.

It is not likely that Congress will act because Congress is situated similarly to the Solicitor. Congressmen are federal employees, the federal revenue is not in danger, and Congress is not the collection agent for the State's taxes. The State, however, proposes that its remedy lies in this Court regardless of Congressional action because of the function of our tri-partite system of government and an authority higher than that of Congress: The Constitution.

For this analysis we must journey back to the origins of judicial power to the case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). In the *Marbury* case, in the year 1800, Jefferson had won the presidency from Adams. In the last days of his presidency in the early part

of 1801, Adams appointed John Marshall as the new Chief Justice and made an appointment to William Marbury to be Justice of the Peace in the District of Columbia. Although Marbury's commission had been signed and sealed, Adams neglected to deliver it to him before he left office and Jefferson refused thereafter to mend the oversight. Marbury then sued the Secretary of State, Madison, in the Supreme Court, asking the Court to issue a Writ of Mandamus to compel Madison to hand over the commission. Chief Justice Marshall's decision in *Marbury* is very applicable in the case at bar today. The Chief Justice begins by stating the questions to be decided: (1) Has the applicant a right to the commission he demands? (2) If he has a right, and that right has been violated, do the laws of his country afford him a remedy? and (3) If they do afford him a remedy, is it a mandamus issuing from this Court?

In answer to the first question, the Court found that the commission was properly signed by the President vesting the officer with legal rights and to withhold the commission was an act deemed by the Court not warranted by law, but violative of a vested legal right. Likewise, in the case at bar, the State can point to the trilogy of cases *Moe*, *Colville* and *Chemehuevi* which undoubtedly vest the State with the legal right to have its valid taxes collected. But the State finds itself in a position similar to Mr. Marbury in that, although the State has a right to have its taxes collected, the Tribe is wrongfully withholding those taxes just as Madison refused to deliver the commission. The Court proceeded to the next question, if he has a right, and that right has been violated, do the

laws of this country afford him a remedy? The Court then stated:

> The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

In finding that the laws of the country did afford Marbury a remedy, the Chief Justice distinguished between a political question and a justiciable question. The Chief Justice explained that the President is invested with certain political powers as to which he is to use his own discretion. Therefore, where the political or confidential agents of the executive act in cases in which the executive possesses a constitutional or legal discretion, their acts are only politically examinable. "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

In the case at bar the Tribe has a specific duty assigned by decisions of this Court to collect the State's taxes. Since the State's rights depend on the performance of that duty, the State must resort to this Court for a remedy. Although Congress has plenary control of Indian tribes under the Commerce Clause, we are not here dealing with the discretionary act of Congress, but rather the illegal act of an Indian tribe. The State accepts the current federal policy of Indian self-determination, but that policy cannot go so far as to impair the State's ability to function effectively in the federal system in violation of

the Tenth Amendment. The legislative policies of Congress are therefore limited by the Tenth Amendment, which policies must reflect and recognize the special and specific position the States occupy in our constitutional system. The State has a right; that right has been violated; the laws of this country do afford a remedy.

Marbury's third question was whether he is entitled to the remedy for which he applies. The Court found that this depended on: (1) the nature of the writ and (2) the power of this Court. As to the first part, the Court found that the writ of mandamus was proper, but it was the second part that was most relevant to the outcome of the case.

The Court found that the Constitution organizes the government and assigns the different departments their respective powers. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time, be passed by those intended to be restrained?" The Court concluded that it was within the power of the Judicial Branch to enforce the legal right of Mr. Marbury because:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

The same result applies to the case at bar. This Court has the power to decide whether the Indian Sovereignty

Doctrine precludes the State's right to collect its taxes. The State is not required to seek Congressional action to allow it to collect a tax. The whole purpose of the Tenth Amendment was to secure to the States that residuum of sovereignty not expressly granted to the Federal Government so that States may exercise the functions essential to separate and independent existence. This Court must decide on the operation of Indian sovereignty and States' rights.

Furthermore, the Doctrine of Sovereign Immunity is a common law principle acquired from our inherited English legal traditions. Since this Doctrine is a product of case law, rather than a political decision or legislative enactment, this Court has the power to amend or abolish it, as it has done so in the past. The Court construed the Doctrine in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 at 171 (1973), where the Court found that the Indian Sovereignty Doctrine with its concomitant jurisdiction limit on the reach of state law, has not remained static during the 141 years since *Worcester v. Georgia*, 6 Pet. 515 (1832) was decided, which set up the Doctrine. "Not surprisingly, the Doctrine has undergone considerable evolution in response to changed circumstances." The Doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. Finally, the trend has been away from the idea of inherent Indian sovereignty as a

bar to state jurisdiction and toward reliance on federal pre-emption, see *Mescalero*, supra.

The framers of the Constitution intended for this court to hear cases such as this one. Alexander Hamilton wrote in The Federalist, No. 78 (1788):

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two that, which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . .

CONCLUSION

The original intent of the Framers of the Constitution was to insure that the several States would not be destroyed as a sovereign political entity by a central government that would become insensitive to the particular problems of a State. The Tenth Amendment and the Great Compromise were intended to protect the States from Federal overreaching by limiting the Federal government in such a way that the States could effectively operate to solve their own problems in their own way.

This case involves a decision regarding the essential power of a State; between tax collection and Indian sovereignty. Congress is indisposed to make this decision. The

Constitution properly lays the burden of this decision on this Court.

Respectfully submitted,

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No. 89-1322

In the Supreme Court of the United States

OCTOBER TERM, 1990

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the counterclaim for declaratory and injunctive relief asserted by petitioner Oklahoma Tax Commission against the respondent Citizen Band Potawatomi Indian Tribe is barred by tribal sovereign immunity.

2. Whether the holdings in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe,* 474 U.S. 9 (1985), that a State may tax the purchase of cigarettes by nonmembers of the Tribe at a store owned and operated by Indians on an Indian Reservation are inapplicable in Oklahoma because Oklahoma has not acquired jurisdiction over Indian country pursuant to Public Law 280, Pub. L. No. 83-280, 67 Stat. 588, as amended.

3. Whether the holdings in *Moe* and *Colville* that a State may not tax sales of cigarettes to members of a Tribe on an Indian reservation apply to sales made to members of respondent Citizen Band Potawatomi Indian Tribe at a store operated by the Tribe on land held in trust by the United States for the benefit of the Tribe.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1322

OKLAHOMA TAX COMMISSION, PETITIONER

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States' interest in this case arises from its special relationship with the Indian Tribes. *United States* v. *Klamath Indians,* 304 U.S. 119, 123 (1938). The historical immunity of Indian Tribes from suit is an important part of the protection afforded tribal sovereignty by federal law, and it furthers current statutory policies of encouraging tribal self-determination and economic development. The United States also has an interest in assuring that these policies are respected in the development of principles governing state taxation of matters affecting Indians. At the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. Respondent is a federally recognized Indian Tribe and is organized under the Oklahoma Indian Welfare Act (OWIA), 25 U.S.C. 503. Pursuant to an 1867 Treaty, a 30-square-mile Reservation was established for the Tribe in Oklahoma. 15 Stat. 531. Under an 1890 Agreement, portions of the Reservation were allotted to tribal members and the remainder was ceded by the Tribe to the United States. Act of Mar. 3, 1891, § 8, 26 Stat. 1016. The ceded lands were then opened to non-Indian settlement. Pet. App. A12-A13.

Article II of the 1890 Agreement provided that certain ceded lands would be retained by the United States as long as they were needed for its use or for Indian purposes. 26 Stat. 1017-1018. Several such tracts, totalling approximately 280 acres, that had been retained for the Shawnee Indian Agency and an Indian farm school were conveyed by Congress to the Tribe in fee in 1960 and 1964. Act of Sept. 13, 1960, 74 Stat. 903; Act of Aug. 11, 1964, 78 Stat. 392.[1] In 1976, pursuant to a special Act of Congress, the land was conveyed back to the United States, to be held in trust for the Tribe. Act of Jan. 2, 1975, 88 Stat. 1922. That conveyance was intended to facilitate economic development on the land, since federal financial assistance was available for projects on land held in trust. S. Rep. No. 877, 93d Cong., 2d Sess. 2, 4 (1974); H.R. Rep. No. 1586, 93d Cong., 2d Sess. 2, 4 (1974). The Tribe subsequently constructed a convenience store on a portion of the land, assisted by federal funds administered by the Department of Housing and Urban Development. Pet. App. A13-A14.

2. The State of Oklahoma levies an excise tax on the sale of cigarettes, at a total rate of $2.30 per carton. Pet. 3; Okla. Stat. Ann. tit. 68, §§ 301 *et seq.* (West 1966 & Supp. 1990). The tax must "be evidenced by stamps which shall be furnished by and purchased from the Tax Commission." § 302 (Supp. 1990). The stamps must be affixed to the cigarettes by any wholesaler that

[1] See H.R. Rep. No. 1661, 86th Cong., 2d Sess. (1960); S. Rep. No. 1605, 86th Cong., 2d Sess. (1960); H.R. Rep. No. 1490, 88th Cong., 2d Sess. (1964); S. Rep. No. 1255, 88th Cong., 2d Sess. (1964).

maintains a place of business in the State; if the wholesaler does not affix the stamps, the retailer must do so. § 305(a) and (b). The retailer, in turn, must collect the tax from the customer, and the "impact of the tax" is expressly "declared to be on the vendee, user, consumer or possessor of cigarettes." § 302 (Supp. 1990). If a person has sold unstamped cigarettes, the Commission may require that person to pay twice the amount of tax due. § 305(c). In addition, unstamped cigarettes held for transportation, sale, or consumption in violation of the law (and vehicles and personal property used for that purpose) are subject to seizure by and forfeiture to the State. § 305(d).

Oklahoma also levies a 4.75 % sales tax on the sale of tangible personal property, including cigarettes. Okla. Stat. Ann. tit. 68, § 1354.1 (Supp. 1990). The sales tax "shall be paid by the consumer or user to the vendor as trustee for and on account of this state," § 1361(A), and the vendor must "collect from the consumer or user the full amount of the tax" and pay it to the Commission. *Ibid.*

If a taxpayer fails to pay either tax, the Commission must determine and issue a proposed assessment of the amount due. The recipient may file a protest within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final, subject to review by the Oklahoma Supreme Court. When a final assessment is filed with the court clerk, it has the same effect and may be executed in the same manner as the final judgment of a state court, and it constitutes a lien on any real estate of the taxpayer in the county. Okla. Stat. Ann. tit. 68, § 221 (Supp. 1990).

3. a. The Tribe sells cigarettes at its store without affixing state tax stamps and without collecting the state cigarette or sales tax from either Indian or non-Indian customers. Pet. App. A17-A18. In February 1987, the Commission issued a proposed assessment to the Chairman of the Tribe's governing body, the Tribal Business Committee, for excise taxes allegedly due on sales of more than 6 million packs of cigarettes at the Tribe's store between December 1, 1982, and September 30, 1986. The amount of tax due was $1,108,413.90; the proposed assessment was for twice that amount plus a 10% penalty ($110,841.39) and

accrued interest ($363,801.51), for a total of $2,691,470.70. Br. in Opp. App. A24-A26; Okla. Stat. Ann. tit. 68, §§ 217 and 305(c) (Supp. 1990). The assessment rendered the Chairman personally liable for the entire amount due. Pet. App. A2.

The Tribe immediately instituted this action for an injunction barring the Commission and its agents "from entering [the Tribe's] Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against [the Tribe], [the Tribe's] officers, agents or employees." Br. in Opp. App. A6-A7. The complaint also sought "such further necessary and proper relief as may be just." *Id.* at A7.

b. Soon after this suit was filed, the Commission withdrew its assessment against the Chairman and issued a new assessment for the same amount against the Tribe. Pet. App. A2, A23-A24. The Commission then filed its answer and a counterclaim for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 13(a). Br. in Opp. App. B1-B7. The Commission alleged in its counterclaim that the Tribe's sale of cigarettes to the general public without payment of state taxes is inconsistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), which upheld application of state taxes to purchases of cigarettes by non-Indians from Indian retailers on a reservation. Br. in Opp. App. B5-B6. The Commission sought (i) a declaratory judgment sustaining its right to tax all of the Tribe's cigarette sales and to enforce its tax laws by assessments and injunctions, and (ii) an injunction barring the Tribe from selling cigarettes upon which the state excise and sales taxes have not been collected and remitted. *Id.* at B6.

The Tribe moved to dismiss the counterclaim, arguing that it is barred by tribal sovereign immunity. The district court rejected that defense, holding that the "relief sought by the [Commission] is so intertwined with the relief sought by the [Tribe] that the counterclaim falls within the scope of waiver contained in the [Tribe's] complaint." Br. in Opp. App. C3. The court

found this result analogous to the doctrine of equitable recoupment, under which a defendant may offset against the plaintiff's monetary claim an amount that the defendant would otherwise be barred from recovering. *Id.* at C3-C4; see also Pet. App. A21-A22.

c. In its final judgment and opinion, Pet. App. A9-A22, the district court first held that the land on which the tribal store is located is a reservation, and therefore "Indian country" within the meaning of 18 U.S.C. 1151(a). It reasoned that a formal designation as a "reservation" is not required, and that it is sufficient if Congress intended to reserve the lands for a Tribe and vest primary jurisdiction in the federal and tribal governments. Pet. App. A15-A16. The court found that test satisfied here, since the United States holds the land in trust for the Tribe in order to foster tribal economic development. *Id.* at A16. It therefore held that this case falls under the usual rules governing application of state law on Indian reservations: although a State may "under certain circumstances" assert authority over activities of nonmembers on a reservation and in "exceptional circumstances" may even assert authority over activities of tribal members, a "*per se* rule" bars "taxation of on-reservation activities of tribal members." *Id.* at A18 (quoting *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 & n.17 (1987)).

Applying these principles, the court held that "the Tribe itself not only is exempt from payment of state sales tax (such exemption is recognized and acknowledged by the [Commission] in pleadings to this Court) but also is immune from liability for the instant assessment since payment of the tax falls not on the ultimate consumer but in this situation on the Tribe." Pet. App. A19; see also *id.* at A21 ("the instant assessment against the Tribe for payment of cigarette sales tax unremitted from 1982 to 1986 is improper").[2] The court also held that "purchasers of cigarettes at the tribal store who are [tribal] members are exempt from payment of state sales tax." *Ibid.* (citing *Moe*, 425 U.S. at

[2] We construe these and other references by the district court to "sales" taxes to include cigarette excise taxes as well.

480-481). On the other hand, because it found the legal incidence of the tax to be on the purchaser, Pet. App. A18, the court held that under *Moe* and *Colville*, the State may tax cigarette sales to nonmembers and that the Tribe must assist the State in collecting those taxes in the future and comply with state record-keeping requirements. *Id.* at A19-A21. The court entered declaratory relief (presumably on the Commission's counterclaim) embodying the foregoing principles. *Id.* at A9-A10.

On the Tribe's claim for injunctive relief, the court ordered that "[the Commission and its officers] are immediately and permanently enjoined from assessing any state sales taxes against and/or collecting any state sales taxes from the [Tribe]" and "from collecting any state sales taxes on purchases by members of [the Tribe] at the Potawatomi Tribal Store." Pet. App. A10. However, consistent with its declaratory relief regarding *Moe* and *Colville*, the court denied what it understood to be the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." *Ibid.*

4. a. On appeal, the Tribe argued (C.A. Br. i, 10-20) that the district court should not have reached the merits of the Commission's counterclaim because it is barred by tribal sovereign immunity. The court of appeals agreed. Pet. App. A2-A5. It explained that "Indian tribes have sovereign immunity from suits to which they do not consent, subject to plenary control [by] Congress," and that "[t]he Supreme Court has held that an Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff." *Id.* at A3 (citing *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940)). It also held that the compulsory counterclaim requirement of Fed. R. Civ. P. 13(a) "cannot be viewed as a congressional waiver of the Tribe's immunity," because Rule 13(a) "is explicitly intended to require joinder of only those claims that might otherwise be brought separately." Pet. App. A4. Finally, the court rejected the district court's "recoupment" rationale for allowing the counterclaim, noting that recoupment is an equitable defense to a suit for a money judgment, and cannot be used to obtain affirmative relief. *Ibid.*

b. Because the court of appeals found the Commission's counterclaim barred by tribal sovereign immunity, it had no occasion to reach the Tribe's alternative argument (C.A. Br. i, 20-36; C.A. Reply Br. 15-20) that the district court erred on the merits of the counterclaim insofar as it declared that the State may tax cigarette sales to nonmembers at the tribal store and that the Tribe must assist the State in collecting such taxes. But the court did address those issues in connection with the Tribe's claim for injunctive relief.

The court of appeals first agreed with the district court that the tract on which the tribal store is located is Indian country for present purposes, since it is within the boundaries of the Tribe's original reservation and is held by the United States in trust for the Tribe. The court therefore found this case distinguishable from *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), which sustained application of a state gross receipts tax to income from a tribal ski resort located on land *leased* from the United States and situated *outside* the Tribe's reservation. Pet. App. A5-A6.

The court then reasoned that because the store is located within Indian country, the Tribe "retain[s] sovereign powers" with respect to the store and, correspondingly, "Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." Pet. App. A7. The court found no such grant of authority here. It distinguished *Colville* on the ground that the Tribe there "had opted to come under state jurisdiction" pursuant to Public Law 280,[3] while Oklahoma has not assumed jurisdiction under Public Law 280. *Ibid.* The court therefore held that "the district court improperly denied the [Tribe's] request to enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes," and it remanded for entry of a permanent injunction to that effect. *Ibid.*

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[3] Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326 and 28 U.S.C. 1360.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that the Commission's state-law counterclaim for declaratory and injunctive relief is barred by tribal sovereign immunity. As the Commission essentially concedes, that holding is compelled by decisions of this Court, including *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (1940), which held a counterclaim barred by tribal sovereign immunity. Immunity to suit is a necessary corollary to Indian sovereignty and self-governance, and it furthers the statutory goals of encouraging tribal self-sufficiency and economic development. Any waiver of tribal sovereign immunity must be unequivocally express, and there is no such waiver here. Although the Commission argues that tribal sovereign immunity should be reconsidered, the Court has made clear that it is up to Congress to decide whether immunity should be eliminated in any given setting.

II. A. The question of the State's power to tax cigarette sales to nonmembers is properly before the Court because it is subsumed in the question whether the State may assess the Tribe for taxes due on such sales. On the merits, *Moe, Colville* and *Chemehuevi* establish the State's right to tax sales to nonmembers at the tribal store. The court of appeals erred in distinguishing this case on the ground that Oklahoma has not assumed jurisdiction over Indian country under Public Law 280. *Moe, Colville* and *Chemehuevi* did not turn on Public Law 280, and the Court has held that Public Law 280 does not confer taxing authority on a State. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

B. The courts below properly concluded that the tribal trust land in this case is a "reservation" for purposes of the further holding in *Moe* and *Colville* that a State may not tax on-reservation cigarette sales to tribal members. That conclusion is supported by the similar holding in *United States* v. *John*, 437 U.S. 634 (1978), regarding land taken in trust by the United States, and by decisions of other courts, Interior Department interpretations, and recent legislation recognizing the important tribal interest in such lands.

ARGUMENT

I. THE COMMISSION'S COUNTERCLAIM IS BARRED BY TRIBAL SOVEREIGN IMMUNITY

A. 1. This Court stated in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977).[4]

The Court adhered to this settled rule in *Santa Clara Pueblo* itself, holding that "[i]n the absence of any unequivocal expression of contrary legislative intent, * * * suits against the tribe under the [Indian Civil Rights Act (ICRA), 25 U.S.C. 1301 *et seq.*] are barred by its sovereign immunity from suit." 436 U.S. at 58-59.

Indian Tribes' immunity to suit is rooted in their status as "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which even today exercise inherent sovereign authority over their members and territory. See *Duro* v. *Reina*, 110 S. Ct. 2053, 2060-2061 (1990); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). The Court recently reaffirmed the rule of tribal sovereign immunity and the foundation on which it rests in *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986). There, the Court held that a State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of its sovereign immunity to all civil causes

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[4] See also *Thebo* v. *Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895); *Haile* v. *Saunooke*, 246 F.2d 293 (4th Cir. 1957); *Maryland Casualty Co.* v. *Citizens Nat'l Bank*, 361 F.2d 517, 520 (5th Cir. 1966); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1067 (1st Cir. 1979); *Morgan* v. *Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968); *Atkinson* v. *Haldman*, 569 P.2d 151 (Alaska 1977); cf. *Native Village of Stevens* v. *Alaska Mgt. & Planning*, 757 P.2d. 32, 34 (Alaska 1988).

of action, because such a condition would "invite[ ] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 890-891. Thus, sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* at 890; see also *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n.10; *United States* v. *Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

Tribal sovereign immunity also plays an important practical role in protecting and preserving tribal self-determination: If Indian Tribes were subject to suits without their consent, scarce tribal resources would be exposed to the expense of litigation and adverse money judgments, which could deprive the Tribes of their ability to furnish necessary services to their members. Cf. *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67 (discussing financial impact on Tribes that would result from implied right of action against tribal officers under ICRA).[5] As the Eighth Circuit observed in *Adams* v. *Murphy*, 165 F. 304, 308-309 (1908):

> Upon considerations of public policy such Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning. If any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments.

Accord, *Thebo* v. *Choctaw Tribe*, 66 F. at 376.

This economic basis for tribal sovereign immunity also finds strong support in the policy – implemented by Congress in such statutes as the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education

[5] As explained below (see page 16, *infra*), a bill introduced during the last Congress would have provided a cause of action against a Tribe or its officers for injunctive or other equitable relief under the ICRA, and would have waived tribal sovereign immunity to that extent. The bill would not, however, have authorized suits for money damages. Even suits for prospective relief would cause Tribes to incur litigation expenses, but such an amendment to the ICRA presumably would rest on a congressional judgment that that is an acceptable cost of protecting the federal rights secured by the ICRA.

Assistance Act of 1975, 25 U.S.C. 450 *et seq.* – of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). In fact, in the Indian Self-Determination Act, which establishes the framework for federal financial support of tribal governments in furtherance of those goals, Congress expressly provided that nothing in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n.

Congress also took account of tribal sovereign immunity in enacting the Indian Reorganization Act. The IRA authorizes a Tribe both to adopt a constitution for the conduct of its government (§ 16, 25 U.S.C. 476) and to receive a separate charter of incorporation to enable it to engage in business activities through a separate entity (§ 17, 25 U.S.C. 477). The principal reason for the latter provision was concern that non-Indian entities would not enter into commercial dealings with the tribal government because of its immunities. 65 Interior Dec. 483, 484 (1958); R. Strickland, *et al.*, *Felix Cohen's Handbook of Federal Indian Law* 325-326 (1982) [hereinafter *1982 Cohen*]. Accordingly, charters of incorporation issued under Section 17 of the IRA often contain a clause allowing the corporation to sue or be sued, but this waiver is limited to the business dealings and assets under the control of that corporation and does not extend to the Tribe in its sovereign capacity, as organized under Section 16 of the IRA. *1982 Cohen* at 325-326;[6] compare *Loeffler* v.

[6] The courts have recognized that these two entities are distinct and that a "sue and be sued" clause in a corporate charter does not waive the immunity of the Tribe as a constitutional entity. *Seneca-Cayuga Tribe* v. *Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Construction Co.* v. *Mescalero Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982); *Gold* v. *Confederated Tribes*, 478 F. Supp. 190, 196 (D. Ore. 1979); *Atkinson* v. *Haldane*, 569 P.2d 151, 170-175 (Alaska 1977); but see *Martinez* v. *Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962). Although the Eighth Circuit expressed a contrary view in *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (1970), it subsequently held that such a clause in a Section 17 charter does not waive immunity

Frank, 486 U.S. 549, 554-557 (1988), and *Kiefer & Kiefer* v. *RFC*, 306 U.S. 381 (1939)(discussing "sue and be sued" clauses applicable to government corporations).

The same distinction appears in the Oklahoma Indian Welfare Act. In addition to authorizing Oklahoma Tribes to adopt a constitution and receive a corporate charter under Sections 16 and 17 of the IRA (see 25 U.S.C. 503), the OIWA authorizes any ten or more individual Indians to form a cooperative association, chartered by the Secretary of the Interior. 25 U.S.C. 504. The OIWA expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 505. The absence of any similar authorization to sue the tribal governments organized under Section 503 of the OIWA (and Section 16 of the IRA) reinforces the conclusion that those governments remain protected by the established rule of immunity.[7]

2. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress," and Congress therefore may authorize suits against Indian Tribes. *Santa Clara Pueblo*, 436 U.S. at 58. But any such waiver of the Tribe's sovereign immunity "cannot be implied but must be unequivocally expressed." *Ibid.* (quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976)). As the Court recognized by quoting *Testan*, this rule conforms to the standard for finding a waiver

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for actions taken pursuant to a Tribe's constitution. *American Indian Agricultural Credit Consortium* v. *Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (1985).

[7] Contrary to the Commission's contention (Pet. 16), the immunity of the Tribe in *Puyallup* applied to off-reservation activities. See *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 167, 171 (1977). Accordingly, even if the Commission were correct that the land at issue here is not a reservation or does not otherwise have a special Indian character for purposes of substantive Indian law principles, the Tribe's sovereign immunity would nevertheless bar the Commission's counterclaim. That is also clear from *U.S. Fidelity & Guaranty Co.*, since under the Commission's submission (Br. 9-21), the Choctaw and Chickasaw Nations' reservations in Oklahoma had long since been abolished, and the Court made clear that immunity exists "even after dissolution of the tribal government." 309 U.S. at 512. Cf. *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (tribe retains authority over inheritance of non-reservation, non-trust property). See also note 16, *infra*.

of the United States' own sovereign immunity to suit. It also conforms to the standard for finding congressional authorization of suits against a State, notwithstanding its Eleventh Amendment immunity. *Dellmuth* v. *Muth*, 109 S. Ct. 2397, 2400 (1989).

The Commission does not suggest that Congress has enacted a law authorizing it to sue the Tribe for twice the amount of taxes allegedly due on past transactions (plus penalties and interest) or for declaratory and injunctive relief regarding application of the State's tax laws. And, while we may assume that a Tribe may waive its immunity to suit if its consent is clearly stated,[8] the Commission points to no such waiver by the Tribe here.

Finally, the court of appeals correctly held that the bar of sovereign immunity is not rendered inapplicable because the Commission sought relief in a counterclaim under Fed. R. Civ. P. 13(a), rather than in a direct action against the Tribe. Pet. App. A4. The Commission, in fact, does not contend otherwise. The Tribe plainly did not *intend* its initiation of the suit to constitute consent to the Commission's broad counterclaim,[9] and there is no basis for concluding that the Tribe's filing of this suit abrogated its sovereign immunity by operation of law.[10] This Court rejected such an argument in *U.S. Fidelity & Guaranty Co.*, holding that sovereign immunity barred a cross-claim

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[8] See, *e.g.*, *Puyallup*, 433 U.S. at 170; *Turner* v. *United States*, 248 U.S. 354, 358 (1919); *McClendon* v. *United States*, 885 F.2d 627, 630-631 (9th Cir. 1989); *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), aff'd, 455 U.S. 130 (1982).

[9] See Br. in Opp. App. A2 (Complaint ¶ 1) ("Plaintiff submits to this Court's jurisdiction for the limited purpose of securing the equitable relief prayed for herein."). Compare *United States* v. *Oregon*, 657 F.2d at 1015; *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 772-773 (D.C. Cir. 1986).

[10] Fed. R. Civ. P. 13 does not purport to dispense with a Tribe's sovereign immunity. See Advisory Committee Note 5 to Rule 13 (counterclaim provisions are subject to the limitation in Fed. R. Civ. P. 82 that the Rules are not to be construed to extend the district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore could not in any event overcome sovereign immunity. See 28 U.S.C. 2072(b) (rules "shall not abridge, enlarge or modify any substantive right").

against a Tribe because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.[11] Other courts have adhered to this rule in the specific context of a state counterclaim filed in response to an action brought by a Tribe to prevent application of state taxes to on-reservation sales of cigarettes. See *Chemehuevi Indian Tribe* v. *California Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985) (quoted at Pet. App. A4), rev'd on other grounds, 474 U.S. 9 (1986); *Confederated Tribes of Colville Indian Reservation* v. *Washington*, 446 F. Supp. 1339, 1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).[12]

B. The Commission does not argue that the sovereign immunity ruling below conflicts with this Court's precedents or with decisions of other courts.[13] To the contrary, it concedes

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[11] Contrary to the Commission's contention (Br. 31; Pet. 12-13), tribal sovereign immunity was central to the Court's holding in *U.S. Fidelity & Guaranty Co.* The Court took note of "[t]he public policy which exempted the dependent as well as the dominant sovereignties from suit without consent," and the Court found the cross-claim barred because "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512.

[12] The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. Pet. App. A4. Equitable recoupment permits a defendant to offset a monetary award in favor of the plaintiff by an amount the plaintiff owes the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. See *United States* v. *Dalm*, 110 S. Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n.6 (citing *Bull* v. *United States*, 295 U.S. 247 (1935)). In *Three Affiliated Tribes II*, the Court noted the Tribe's concession that the non-Indian defendant could assert a setoff or recoupment arising out of the same transaction, but it declined to consider whether a counterclaim might also be used to fix the Tribe's affirmative liability. 476 U.S. at 891 & n.*.

[13] In a decision not cited by the Commission or the panel below, the Tenth Circuit previously held that the ICRA dispensed with a Tribe's sovereign immunity to a damages action brought under that Act by a nonmember who had no remedy in a tribal forum. *Dry Creek Lodge, Inc.* v. *Arapaho-Shoshone Tribe*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981). *Dry Creek Lodge* is plainly inconsistent with *Santa Clara Pueblo*, which does not limit a Tribe's immunity to suits arising from intra-tribal disputes; to the contrary, the Court relied on earlier decisions which did not involve intra-tribal disputes. See 436 U.S. at 58 (citing *Puyallup*, 433 U.S. at 172-173, and *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512-513). Furthermore, *Dry Creek Lodge* rests on the spurious premise that "[t]here has to be a forum where the dispute can be settled," 623 F.2d at 685; the very purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived. For these reasons, the Ninth Circuit has rejected the *Dry Creek Lodge* analysis, *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 719 F.2d 979, 981 (1983), and the Tenth Circuit has avoided following *Dry Creek Lodge* by reading it extremely narrowly. See, *e.g.*, *Nero* v. *Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (1990). See U.S. Amicus Br. (at 13-14) in *Puckett* v. *Native Village of Tyonek*, petition for cert. pending, No. 89-609.

In any event, *Dry Creek Lodge* is of no relevance here. This case arises under state law (see note 16, *infra*), not the ICRA, and there accordingly can be no contention here, as there was in *Dry Creek Lodge*, that Congress must have intended there to be a forum to obtain redress for violations of rights Congress itself created.

(Br. 28-29) that *U.S. Fidelity & Guaranty* and *Puyallup* furnish "compelling" support for the Tribe's claim of immunity. The Commission argues (Br. 29, 31-32; Pet. 12, 16-17), however, that the Court should reconsider the doctrine of tribal sovereign immunity.

As we have explained, the Court has repeatedly held that an Indian Tribe is absolutely immune from suit without its consent unless Congress dispenses with the immunity. Although Congress has occasionally authorized suits against Tribes where it believed the public interest so required,[14] it has not enacted any general abrogation of tribal sovereign immunity. To the contrary, Congress has endorsed and acted upon the long-established principle that Indian Tribes are immune from suit.

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[14] See *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *Green* v. *Menominee Tribe*, 233 U.S. 558 (1914)(special jurisdictional statute for adjudication of claims by Indian traders against Tribe); *United States* v. *Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of 1891, ch. 538, 26 Stat. 851); see generally *Thebo* v. *Choctaw Tribe*, 66 F. at 373-374 & n.1; *1982 Cohen* 324. Cf. 25 U.S.C. 450f(c) (requiring carrier insuring Tribe under Indian Self-Determination Act to "waive any right it may have to raise as a defense the sovereign immunity of the Indian tribe from suit," but only up to policy limit and excluding liability for pre-judgment interest and punitive damages).

See, *e.g.*, 25 U.S.C. 450n; pages 11-12 *supra*. There is accordingly no reason for this Court to reexamine its own precedents affirming that principle.

Furthermore, the question of tribal sovereign immunity is involved in studies by the Commission on Civil Rights and Congress concerning enforcement of the Indian Civil Rights Act and its interaction with the traditional sovereign powers of Indian Tribes.[15] A bill was introduced during the last Congress that would have authorized suits against Indian Tribes and tribal officers for injunctive or other equitable relief (but not money damages) to secure compliance with the ICRA. S. 517, 101st Cong., 1st Sess. (1989). The bill would have expressly waived the sovereign immunity of Tribes to those suits, but required exhaustion of tribal remedies before such a suit could be brought. The effect of the bill, if enacted, would have been to allow certain of the suits this Court held in *Santa Clara Pueblo* were barred by sovereign immunity as against the Tribes and were not authorized by the ICRA as against tribal officers.

In these circumstances, this would not, in our view, be a suitable occasion for the Court to reexamine the firmly established doctrine of tribal sovereign immunity, even if such a reexamination might sometime be called for. That is especially so in view of the fact that, unlike the plaintiffs in *Santa Clara Pueblo*, the Commission in this case does not invoke any substantive rights conferred on it by an Act of Congress. Its counterclaim arises entirely under *state* law. Because the Court has repeatedly held that only Congress may dispense with a Tribe's sovereign immunity, the Court should not undertake to do so itself where Congress has not even enacted a substantive rule of conduct to which the abrogation of sovereign immunity from suit might be tied. See *Three Affiliated Tribes II*, 476 U.S. at 891 ("in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from

[15] *Hearings Before the United States Comm'n on Civil Rights: Enforcement of the Indian Civil Rights Act* (1986-1988) (5 vols.); *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Comm. on Indian Affairs*, 100th Cong., 1st Sess. (1988).

diminution by the States"); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d at 1056; *Haile* v. *Saunooke*, 296 F.2d at 297-298.[16]

[16] In *Oklahoma Tax Comm'n* v. *Graham*, 109 S. Ct. 1519 (1989), the Court held that the Commission's suit against the Chickasaw Nation and the manager of a tribal enterprise to collect unpaid state cigarette taxes was one arising under state, not federal law, and therefore could not be removed by the Nation to federal district court. After the *Graham* case was remanded back to the state courts following this Court's jurisdictional ruling, the trial court dismissed the case, finding it barred by tribal sovereign immunity. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, No. C-85-223 (Dist. Ct. Murray Cty. July 18, 1989). The Commission's appeal of that dismissal has been briefed and is pending before the Oklahama Supreme Court (No. 73,729).

The Oklahoma Supreme Court previously held in *Oklahoma ex rel. May* v. *Seneca-Cayuga Tribe*, 711 P.2d 77, 83-84 (1985), cited by the Commission (Br. 26; Pet. 10-11), that tribal sovereign immunity did not bar a declaratory judgment action against a Tribe concerning the legality of its bingo operations under state law. However, the Oklahoma Supreme Court erroneously relied on the balancing approach applied by this Court in determining whether state *substantive* law applies to reservation activities, rather than the absolute rule, consistently followed by this Court, that the Tribe itself is immune from suit. The Tenth Circuit subsequently affirmed a preliminary injunction barring further state-court proceedings in *Seneca-Cayuga*, in part because of the Oklahoma Supreme Court's clear error on the tribal sovereign immunity issue. *Seneca-Cayuga Tribe*, 874 F.2d at 714-716.

In its decision following the remand to the state courts in the *Graham* case, the Murray County District Court concluded in dismissing the suit on tribal sovereign immunity grounds that the Oklahoma Supreme Court's *Seneca-Cayuga* decision should not be followed in light of this Court's intervening decision in *Three Affiliated Tribes II*, 476 U.S. at 890-891, which makes clear that an Indian Tribe is immune from suit in state court absent federal authorization. Slip op. 3. The District Court also rejected the Commission's argument that as a result of allotment and statehood, Indian Tribes in Oklahoma are not protected by sovereign immunity. It explained that this position could not be reconciled with *Turner* v. *United States* and *U.S. Fidelity & Guaranty Co.*, "each of which involved Oklahoma Indian tribes and were decided long after [the Commission] contends the tribes were stripped of immunity." Slip op. 3-4.

II. THE JUDGMENT BELOW SHOULD BE VACATED INSOFAR AS IT CONCERNS INJUNCTIVE RELIEF IN FAVOR OF THE TRIBE, AND THIS ASPECT OF THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR FURTHER CONSIDERATION

Although the court of appeals correctly ordered dismissal of the Commission's counterclaim on sovereign immunity grounds, it erred with respect to a central aspect of the Tribe's request for injunctive relief. On the premise that the State may not tax any purchases of cigarettes at the tribal store, whether by members or nonmembers, the court ordered the entry of broad injunctive relief in favor of the Tribe. It is well settled under *Moe*, *Colville* and *Chemehuevi*, however, that a State may tax on-reservation sales of cigarettes to nonmembers.

Because the court of appeals held *all* sales of cigarettes at the tribal store exempt from state taxes, it had no occasion to consider what measures the State might take to enforce its tax laws if those laws do apply to some such sales, and it is not clear what measures the Commission would propose to take. We therefore suggest that the Court vacate the portion of the judgment below that addresses the Tribe's request for injunctive relief and remand to the court of appeals for further consideration of that question. Compare *Colville*, 447 U.S. at 162 (declining to consider legality of possible enforcement measures). The Tribe then should be given a reasonable opportunity to assume its obligation to assist the Commission in collecting taxes on sales to nonmembers. If it does so, the matter of future enforcement measures need never be addressed.[17]

[17] Under the principles of sovereign immunity discussed in Point I, the Commission could not recover a money judgment, to be paid out of the Tribe's treasury, for taxes due on past sales (plus penalties and interest), either in a judicial proceeding or in an administrative assessment proceeding, in which the final decision has the same effect as the judgment of a state court (Okla. Stat. Ann. tit. 68, § 221 (Supp. 1990)). Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). Moreover, because the tax was not collected from the customers who purchased cigarettes at the store and the incidence of the assessment therefore would be on the Tribe, an assessment against the Tribe would conflict with the "*per se* rule" barring state taxation of Tribes and tribal members. *Cabazon*, 480 U.S. at 215 n.17; see Pet. App. A19, A21.

However, there are measures available to the Commission to ensure collection of the tax in the future. First, it may seek to enter into an agreement with the Tribe to implement the latter's duty to assist in collecting the taxes. From the Tribe's perspective, such an agreement between sovereigns concerning transactions over which they share jurisdiction would be in furtherance, not derogation, of its inherent sovereignty. See 25 U.S.C. 476 (authorizing Tribes "to negotiate with the Federal, State, and local governments"); 25 U.S.C. 2710(d) (authorizing Tribal-State compacts for certain Indian gaming). Second, if the Tribe continues to sell unstamped cigarettes, the Commission could assess the unpaid taxes against wholesalers that supply such cigarettes to the Tribe (Okla. Stat. Ann. tit. 68, § 305(a) and (c)), as it has done before. See *City Vending of Muskogee, Inc.* v. *Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). Third, the Commission could seize and forfeit unstamped cigarettes (and the vehicle transporting them) enroute to the tribal store (Okla. Stat. Ann. tit. 68, § 305(d)). See *Coville*, 447 U.S. at 161-162. Fourth, the Commission could bring an injunctive action in an appropriate court to require tribal officers and the manager of the tribal store to collect and remit the taxes. Cf. *Santa Clara Pueblo*, 436 U.S. at 59 (sovereign immunity does not bar injunctive action against tribal officers). The Tribe's courts have jurisdiction, *inter alia*, "over all general civil claims which arise within the tribal jurisdiction, and over all transitory claims in which the defendant may be served within the tribal jurisdiction." Tribal Code of the Citizen Band Potawatomi Indian Tribe, Tribal Courts § 4.

A. Under *Moe*, *Colville* And *Chemehuevi*, The State May Tax Sales Of Cigarettes To Nonmembers At The Tribal Store

1. As an initial matter, the Tribe argues (Br. in Opp. 7-8, 10; Supp. Br. 4, 6-8 (Pet. Stage)) that the question of the State's authority to tax sales of cigarettes to nonmembers at the tribal store is not presented by this case. The proceedings in the courts below are somewhat confused, but we believe that the Court may reach the issue, and that it should do so in order to remove any doubt on the question among Oklahoma Tribes.

The Tribe sought injunctive relief principally to prevent the Commission from assessing *past* taxes against the Tribe itself, although the complaint did seek such further relief as may be just. See page 4, *supra*. The district court not only enjoined the assessment; it also enjoined the Commission "from collecting

any state sales taxes on purchases by members of [the Tribe]" and denied what it understood to be the Tribe's "request" for "further permanent injunctive relief as to collection of state sales taxes on purchases by nonmembers." Pet. App. A10. These portions of the judgment address collection of state taxes on future as well as past sales.

The court of appeals held that "Oklahoma has no authority to tax the store's transactions" and distinguished *Colville* (which upheld state taxes on purchases by nonmembers) on the ground that Oklahoma, unlike the State of Washington in *Colville*, has not assumed jurisdiction under Public Law 280. The court therefore held that the district court improperly denied the Tribe's "request" to "enjoin Oklahoma from collecting state sales tax on the [Tribe's] sales of cigarettes" (presumably including future sales to nonmembers), and it remanded for entry of such an injunction. Pet. App. A7.

It is not clear on what basis the court of appeals addressed this issue. The Tribe's briefs on appeal did not expressly challenge the district court's denial of injunctive relief barring collection of taxes on sales to nonmembers. On the other hand, the Tribe did argue the merits of that issue in connection with the Commission's counterclaim (C.A. Br. i, 20-36), and it urged the court of appeals to reverse the district court's judgment not only with instructions to dismiss the counterclaim, but also "to reform the judgment so it no longer grants the relief sought in the counterclaim." C.A. Br. 39. In light of this urging, the court of appeals might have concluded that an award of injunctive relief barring the Commission from exercising the authority it sought to have vindicated in its counterclaim was fairly comprised by the Tribe's submission on appeal.

There is, however, another basis on which the Court may address the question of the State's authority to tax sales to nonmembers. The Commission has consistently challenged the district court's injunction insofar as it bars the Commission from taking any steps to assess state taxes against the Tribe itself. If (as the court of appeals held) the State may not impose its tax on *any* sales of cigarettes at the tribal store (to either

members or nonmembers), then the Commission may not assess against the Tribe *any* of the taxes that the Commission alleges are due on past sales. This would be so whether or not the Tribe is correct in its further argument that the Commission may not in any event assess taxes against the Tribe itself because the incidence of the tax would then be on the Tribe, not the ultimate purchasers. It therefore would be appropriate for the Court to dispose of this threshold question of the State's authority to tax sales to nonmembers, in order to establish the context for considering what measures the Commission may take to enforce the State's tax laws in this setting.

2. On the merits, the court of appeals clearly erred in holding that all cigarette sales at the tribal store are wholly beyond the State's taxing jurisdiction. This Court has thrice held—in *Moe, Colville* and *Chemehuevi*—that where the legal incidence of a state cigarette tax is on the purchaser, a State may impose that tax on purchases by nonmembers from a tribal store on an Indian reservation and the Tribe must assist in collecting the tax. 425 U.S. at 481-483; 447 U.S. at 151, 159; 474 U.S. at 11-12. The district court here held that the legal incidence of the state tax is on the customer. Pet. App. A18. Neither the court of appeals nor the Tribe has questioned that ruling, which in any event seems compelled by the text of the Oklahoma statutes (quoted at page 3, *supra*). *Moe, Colville* and *Chemehuevi* therefore are controlling here and permit Oklahoma to impose its tax on cigarette purchases by nonmembers and to obligate the Tribe to collect the tax.

Although the particular reservations involved in *Moe, Colville* and *Chemehuevi* had been brought under the civil jurisdiction of the State pursuant to Public Law 280, in none of the three cases did the Court's holding depend on that fact. And with good reason. Public Law 280 permits a State to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, and provides that the "civil laws" of the State that are of general application to private persons and property shall then apply in Indian country. 25 U.S.C. 1322(a), 28 U.S.C. 1360(a). In *Bryan* v. *Itasca County*, 426 U.S. 373

(1975), the Court held that these provisions of Public Law 280 only permit state courts to adjudicate disputes involving Indians and to apply state law in deciding such cases, and do not confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. See also *Rice* v. *Rehner*, 463 U.S. 713, 734 n.18 (1983) (civil jurisdiction conferred on a State by Public Law 280 "does not include regulatory jurisdiction to tax"); *Cabazon*, 480 U.S. at 208-209, 210 n.8 (same).

Indeed, the Tribe's notion (Br. in Opp. 8) that the ruling in *Colville* may be explained by Public Law 280 is refuted by the discussion of *Bryan* v. *Itasca County* in *Colville* itself (447 U.S. at 142 n.8):

> Initially the State [of Washington] asserted [in the district court] that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservations. After this theory was rejected in *Bryan* v. *Itasca County, supra*, the State abandoned any claim of authority to tax sales to tribal members. 446 F. Supp., at 1346, n.4.

In light of the Court's acceptance of Washington's concession that Public Law 280 did not furnish a basis for the State to tax sales to *members*, there simply is no ground for contending that the same grant of civil jurisdiction under Public Law 280 was the essential (yet unspoken) basis for the Court's holding that the State could tax *nonmembers*.

Moreover, in *Moe*, Montana's assumption of civil jurisdiction over the Flathead Reservation under Public Law 280 was limited to particular subject matters, and the district court had held that "the power to impose cigarette and licensing taxes is *not* among the categories of assumed civil jurisdiction." *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1306 (D. Mont. 1975) (three-judge court) (emphasis added). Public Law 280 therefore could not have been the basis for this Court's holding that Montana may tax sales to nonmembers. See also *Cotton Petroleum Corp.* v. *New Mexico*, 110 S. Ct. 1698 (1989)

(sustaining application of state tax to on-reservation activities of non-Indian in New Mexico, which has not assumed jurisdiction under Public Law 280).

Thus, the State's authority to tax cigarette purchases by nonmembers in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to—but rather existed independently of—Public Law 280. It follows that Oklahoma's power to tax cigarette purchases by nonmembers at the Tribe's store in this case likewise exists independently of Public Law 280, and that Oklahoma's failure to acquire civil jurisdiction under Public Law 280 therefore does not foreclose it from exercising that power.

B. Sales Of Cigarettes To Tribal Members At The Tribal Store Are Exempt From State Taxation

The Commission urges the Court to go further and to allow it to collect state taxes even on sales of cigarettes to tribal members at the tribal store. Specifically, the Commission argues (Br. 9-21) that the other relevant holding in *Moe* and *Colville*—that a State may not tax sales to tribal members on a reservation—does not apply to the tribal trust land at issue here. In our view, however, the courts below properly concluded that the Tribe's land is a reservation for purposes of *Moe* and *Colville*, and that sales to tribal members are therefore exempt from state taxation.

In holding that the tribal trust land is a reservation, the court of appeals followed this Court's decision in *United States* v. *John*, 437 U.S. 634 (1978). Pet. App. A5-A6. There, an Act of Congress declared the title to all land previously purchased for the Mississippi Choctaw Indians to be "in the United States in trust for such Choctaw Indians." Act of June 21, 1939, ch. 235, 53 Stat. 851. 437 U.S. at 646. The Court noted that the definition of "Indian country" in 18 U.S.C. 1151 was based on prior decisions of this Court construing that term, including *United States* v. *McGowan*, 302 U.S. 535, 539 (1938), which stated that the test is whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." 437 U.S. at 648-649. Applying that test, the

Court saw "no apparent reason why [the Mississippi] lands * * * did not become a 'reservation,' at least for purposes of federal criminal jurisdiction," at the time they were taken into trust by Act of Congress. *Id.* at 649. The Court further noted that "if there were any doubt about the matter," the situation was "completely clarified" by a 1944 Interior Department order proclaiming the lands to be a reservation and by the Secretary's subsequent approval of a constitution and by-laws for the Mississippi Band under the IRA. *Ibid.*

As in *John,* there is "no apparent reason" why the land at issue here did not become a reservation – at least for present purposes – when it was taken into trust by the United States for the benefit of the Tribe pursuant to an Act of Congress. A formal proclamation or designation of "reservation" status was not necessary, *McGowan,* 302 U.S. at 538-539, since the land was "validly set apart for the use of the Indians as such" – Indians who, like the Mississippi Choctaws in *John,* have adopted a constitution and by-laws under federal law and therefore are "under the superintendence of the Government." 437 U.S. at 648-649.

The decisions below on this point are consistent with the long-standing view of the Department of the Interior that tribal trust lands in Oklahoma may have "reservation" status. 58 Interior Dec. 85, 100-101 (1942); 59 Interior Dec. 1, 2 & n.5 (1943). They also are consistent with prior Tenth Circuit holdings regarding tribal lands within the boundaries of the original reservations of other Oklahoma Tribes, *Indian Country U.S.A., Inc.* v. *Oklahoma,* 829 F.2d 967, 973-976 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988); *Cheyenne-Arapaho Tribe* v. *Oklahoma,* 618 F.2d 665, 668 (10th Cir. 1980), and with similar rulings by other courts. See *Langley* v. *Ryder,* 778 F.2d 1092, 1095 (5th Cir. 1985); *United States* v. *Sohappy,* 770 F.2d 816, 822-823 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986); *State* v. *Sohappy,* 110 Wash. 2d 907, 910-912, 757 P.2d 509, 511-512 (1988); cf. *State* v. *Begay,* 105 N.M. 498, 734 P.2d 278 (App. 1987).[18]

[18] In *Oklahoma ex rel. May* v. *Seneca-Cayuga,* 711 P.2d 77, 79-83 (Okla. 1985), the Oklahoma Supreme Court held that parcels of formerly allotted land that were taken into trust by the United States for two Tribes pursuant to the OIWA (and that later became the sites of bingo operations) are "Indian country" because they remain allotments under 18 U.S.C. 1151(c). The Oklahoma Supreme Court found it unnecessary to decide whether the parcels also qualify as "reservations." See also *Enterprise Management Consultants, Inc.* v. *Oklahoma Tax Comm'n,* 768 P.2d 359, 363 n.16 (1988) (apparently assuming arguendo that Potawatomi tribal land at issue here is Indian country, but sustaining application of state sales tax to concessions of non-Indian company operating bingo games on land because company did not show it was agent of Tribe); *id.* at 366, 367-368 (Kauger, J., concurring) (land is Indian country, but tax valid because company did not show bingo operation was tribal enterprise); *Housing Auth. of the Seminole Nation* v. *Harjo,* 790 P.2d 1098 (Okla. 1990) (Indian Housing Authority is "dependent Indian community"); *C.M.G.* v. *State,* 594 P.2d 798 (Okla. Crim. App. 1979) (Indian school is "dependent Indian community").

Significantly, moreover, Congress endorsed the application of general Indian-law preemption principles to lands such as these when it passed the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.,* which essentially codifies this Court's holding in *Cabazon* that state law did not apply to a tribal bingo game on an Indian reservation. See S. Rep. No. 446, 100th Cong., 2d Sess. 6 (1988). The IGRA broadly defines the "Indian lands" on which an Indian Tribe may operate or regulate certain gambling operations to include not only lands within the limits of a reservation, but also, *inter alia,* "any lands title to which is * * * held in trust by the United States for the benefit of any Indian tribe * * * and over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). In addition, although the IGRA generally prohibits gaming on lands acquired by the Secretary in trust for a tribe after passage of the IGRA, there is an exception for lands located within or contiguous to a Tribe's reservation and for lands in Oklahoma that are "within the boundaries of the Indian tribe's former reservation" or are "contiguous to other land held in trust * * * for the Indian tribe in Oklahoma." 25 U.S.C. 2719(a)(2)(A). It thus is clear from the IGRA that Congress has concluded that general principles limiting application of state law to on-reservation activities of a Tribe may properly be applied to tribal trust land such as that at issue here. Other recent legislation manifests a similar purpose to affirm tribal sovereignty over tribal trust

lands, as well as other Indian lands within the original boundaries of the Oklahoma reservations.[19]

In light of the foregoing judicial, administrative and statutory precedent, the court of appeals properly concluded that the principles of *Moe* and *Colville* that exempt sales to tribal members from state taxation should be applied to sales on the Potawatomi Tribe's trust land.[20]

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[19] See 25 U.S.C. 1452(d) ("reservation" for purposes of Indian Financing Act includes "former Indian reservations in Oklahoma"); 25 U.S.C. 1903(10) ("reservation" for purposes of Indian Child Welfare Act includes Indian country as defined in 18 U.S.C. 1151 and any other lands, not covered by that Section, "title to which is * * * held by the United States in trust for the benefit of any Indian tribe"); 33 U.S.C. 1377(c) (sewage treatment grants for Indian Tribes available in "former Indian reservations in Oklahoma"); 42 U.S.C. 2992c(2) ("reservation" for purposes of financial assistance under Native American Programs Act of 1974 includes "any former reservation in Oklahoma").

[20] The Commission's contrary argument (Br. 9-21) rests almost entirely on circumstances preceding Oklahoma's admission to the Union, when the reservations originally set aside for Oklahoma Tribes were allotted and the reservations themselves disestablished. Our submission in no way suggests that the boundaries of those original reservations continue to exist or should be reinstated, such that *all* land within those boundaries (both Indian and non-Indian) would be "Indian country." This case involves the distinct and much narrower question whether land within the boundaries of the original reservation of an Oklahoma Tribe that is held in trust for a Tribe is Indian country. The Commission's historical discussion does not address this argument, which is supported by much modern precedent.

The Commission must concede that allotments within the original reservation boundaries that are still held in trust are "Indian country" under 18 U.S.C. 1151(c), and are therefore subject to the jurisdiction of the United States and the Tribe, rather than the State. It would be perverse if land held in trust for the Tribe itself, over which the Tribe's claim of sovereignty presumably is even stronger, did not also qualify as Indian country. These circumstances, and the fact that the land was taken in trust pursuant to Act of Congress, distinguish *Mescalero Apache Tribe* v. *Jones, supra,* on which the Commission relies (Br. 9, 27, 38). There, the land in question was located *outside* the Tribe's reservation and was *leased* to the Tribe by the Forest Service. See Pet. App. A5-A6. Moreover, in *Jones,* most of the revenue that the Court found to be taxable presumably was generated by nonmember guests; this case involves the narrower question whether the State may tax transactions specifically between the Tribe and its own members at the tribal enterprise.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it directs dismissal of the Commission's counterclaim on sovereign immunity grounds. The judgment of the court of appeals should be vacated insofar as it addresses the Tribe's claim for injunctive relief, and the case should be remanded to the court of appeals for further consideration of that claim in light of the views expressed herein.

Respectfully submitted.

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No. 89-1322

IN THE

Supreme Court of the United States

October Term, 1989

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Petitioner,

vs.

THE CITIZEN BAND OF POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE IROQUOIS BUSINESSPERSONS ASSOCIATION AS AN *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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Interest of the Iroquois Businesspersons Association

The Iroquois Businesspersons Association ("IBA") is an unincorporated association composed of Indians from the Six Nations of the Iroquois Confederacy, located in

New York State. Among the IBA's prime concerns are the protection of the Iroquois' right to self-determination and the opposition of state efforts to derogate tribal sovereignty. In accordance with these objectives, the IBA has a vital interest in seeking an affirmance of the lower court's decision herein prohibiting a direct tax assessment against the Respondent, Petitioner and Respondent have consented to the filing of this brief.

Summary of Argument

The decision below raises issues of great importance for Native Americans throughout the United States who seek to further implement the expressly stated federal policies of Indian self-determination and self-sufficiency. This brief is submitted in support of the Respondent and in support of an affirmance of the Tenth Circuit Court of Appeals' decision in this case. The argument herein is limited to (i) opposition to the Petitioner's attempt to expand this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville,* 447 U.S. 134 (1980) to allow direct state taxation of an Indian tribe without express congressional authority, and (ii) opposition to the Petitioner's attempt to have this Court overrule *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) and *United States v. United States Fidelity and Guaranty Company,* 309 U.S. 506 (1940) regarding a tribe's sovereign immunity. We do not address the particular factual questions concerning the Respondent's status *vis-a-vis* the State of Oklahoma, except to adopt the views expressed by the Respondent.

ARGUMENT

I. The Court below correctly recognized tribal sovereign immunity as a complete defense to the State of Oklahoma's lawsuit to assess taxes directly against the Respondent.

The Court of Appeals correctly held that the Oklahoma Tax Commission's ("Oklahoma") counterclaim for declaratory relief sustaining its right to assess taxes against The Citizen Band of Potawatomi Indian Tribe of Oklahoma (the "Tribe") is barred by sovereign immunity, Pet. Cert. App. A3-A5. Indeed, the lower court's conclusion is compelled by this Court's consistent holding that an Indian Tribe is absolutely immune from suit without its consent unless Congress unequivocally and expressly waives that sovereign immunity. *See, Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *United States v. United States Fidelity and Guaranty Company,* 309 U.S. 506, 512 (1940).

Oklahoma recognizes the Court's repeated affirmations of tribal sovereign immunity, but asks this Court to ignore the requirement of congressional action and "overrule" the defense of tribal sovereign immunity, Pet. Brief, p. 39. The Petitioner complains that its right to require non-Indian citizens to pay taxes for cigarettes purchased on Indian lands is worthless ". . . since a right without a remedy is no right at all" Pet. Brief, p. 29. Aside from the obvious remedy of proceeding directly against the non-Indian purchasers, Oklahoma's alternative is clear—take the matter up with Congress.

Since Oklahoma's counterclaim arises under state law[1] and Oklahoma does not assert any basis to conclude that Congress has abrogated the Tribe's sovereign immunity, the Court should not reexamine the longstanding principle that only Congress may disestablish a Tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 59.

II. Absent clear congressional authority, Indians are immune from state taxation and states are precluded from assessing taxes against Indians.

Oklahoma's actions in this case are undisputed—the state issued an assessment letter to the Tribe on March 4, 1987, in the amount of $2,691,470.70 for the sale and distribution of unstamped cigarettes on tribal lands, Pet. Cert. App., A-23. Oklahoma cites no federal authority for the proposition that a state can assess such cigarette taxes against the Tribe, but proposes that its state taxes are applicable to the Tribe's "sales transactions" under the authority of this Court's decision in *Washington v. Confederated Tribes of Colville,* 447 U.S. 134 (1980), Pet. Brief, p. 5. Oklahoma's characterization of the tax as "applicable to the Tribe's sales transactions" is erroneous and misleading. The tax at issue in this case is not an assessment on "sales transactions", but rather a direct assessment on the Potawatomis. None of the cases relied upon by Oklahoma upheld the direct assessment of a state tax against an Indian tribe. To the contrary, this Court has consistently held that Indian tribes and individuals are immune from state taxation in the absence of unmistakably clear authority from Congress

[1] *See, Oklahoma Tax Commission v. Graham,* _____ U.S. _____, 109 S.Ct. 1519 (1989), where the Court held that Oklahoma's suit against the Chickasaw Nation for unpaid cigarette taxes arose under state law and could not be removed to federal court.

to impose state taxes on Indians. *See, Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

As the Court recognized in *Montana v. Blackfeet Tribe, supra*, any analysis of a state's attempt to tax Indians begins with the notion that "Indian tribes and individuals generally are exempt from state taxation within their own territory." 471 U.S. at 764. The next step is to determine whether Congress has expressly authorized the imposition of the state tax on Indians:

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.
> *Montana v. Blackfeet Tribe, supra*, 471 U.S. at 765.

In this case, Oklahoma does not cite any authority for the proposition that it can lawfully assess its cigarette tax against the Tribe. Instead, by casting its argument in terms of a tax on the "sales transaction", Oklahoma attempts to extend the Court's "minimal burdens" analysis developed in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) to provide for direct state taxation of an Indian tribe without express congressional authority.[2]

[2] Although not applicable in Oklahoma, Public Law 280 [25 U.S.C. 1332(a), 28 U.S.C. 360(a)], which permits certain states to assume jurisdiction over "civil causes of action" in Indian country to which Indians are parties, does not confer authority on those states to extend its full range of regulatory authority, including taxation, over Indians on Indian reservations. *See, Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).

In *Moe v. Confederated Salish and Kootenai Tribes, supra*, the Court held that where the incidence of a tax falls upon the non-Indian purchaser, the "minimal burden" of collecting the tax from the non-Indian purchaser, who bore the liability for the tax, was not a tax at all on the Indian, and, therefore, the requirement of express congressional authorization to tax Indians did not come into play:

> The state's requirement that the Indian tribe collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. *Since this burden is not, strictly speaking, a tax at all*, it is not governed by the language of *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145 (1973)] at 475, dealing with the special area of state taxation.
> *Moe v. Confederated Tribes, supra*, 425 U.S. at 483 [emphasis added].

Whatever enforcement rights the Court intended to apply in *Moe* it is clear that direct assessment of the tax against the tribe was not one of them. Similarly, neither *Washington v. Confederated Tribes of Colville, supra*, cited by Oklahoma, nor *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1986), upheld the direct assessment of a state tax against Indians. In this case, since Oklahoma directly assessed the tax against the Tribe, without authority from Congress, the assessment cannot be sustained.

Conclusion

The opinion of the Tenth Circuit Court of Appeals should be affirmed.

Dated: December 12, 1990

Respectfully submitted,

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FOR ARGUMENT

(9)

No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

Oklahoma Tax Commission,

Petitioner,

v.

The Citizen Band Potawatomi
Indian Tribe of Oklahoma,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE SENECA-CAYUGA TRIBE OF OKLAHOMA, WYANDOTTE TRIBE OF OKLAHOMA, PAWNEE INDIAN TRIBE OF OKLAHOMA, OTOE-MISSOURIA TRIBE OF OKLAHOMA, PONCA TRIBE OF INDIANS OF OKLAHOMA, KAW INDIAN TRIBE OF OKLAHOMA, TONKAWA TRIBE OF INDIANS OF OKLAHOMA, AND KIOWA, COMANCHE AND APACHE INTERTRIBAL LAND USE COMMITTEE IN SUPPORT OF RESPONDENT

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No. 89-1322

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

OKLAHOMA TAX COMMISSION, Petitioner,

v.

THE CITIZEN BAND POTAWATOMI
INDIAN TRIBE OF OKLAHOMA, Respondent.

BRIEF OF AMICI CURIAE TRIBES IN SUPPORT OF RESPONDENT

CONSENT TO FILING

Both parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The amici are all federally recognized Indian tribes (and one intertribal organization) which occupy federally-owned tribal trust lands within the State of Oklahoma. The tribes exercise a broad range of self-governing powers within these lands and are engaged in various forms of economic development activities that generate revenues used to provide tribal programs and services for their members. These efforts are fully consistent

with current federal Indian policies, which seek to promote and foster tribal self-government through economic self-sufficiency. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 and ns. 19 and 20 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983).

Certain positions advanced by the Oklahoma Tax Commission in this case would seriously threaten the attainment of these important national goals. In particular, the Tax Commission contends that federally-owned tribal trust land in Oklahoma is "off-reservation" land and should be subject to complete state jurisdiction. In addition, the Commission urges this Court to abandon the long-recognized doctrine of tribal sovereign immunity from unconsented suit.

These results would be contrary to the established precedents of this Court and to the policies and expectations of Congress. As a result, the amici tribes have a substantial interest in opposing the State's wide-ranging attack on tribal self-government in Oklahoma by means of this amicus brief.

SUMMARY OF ARGUMENT

The Tenth Circuit was correct in holding that the tribal trust land of the Potawatomi Tribe is "Indian Country" within the meaning of 18 U.S.C. §1151(a). That statute defines "Indian Country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . . ." Under well established precedents of this Court and an unbroken line of authority from the Tenth Circuit, which has extensive experience in dealing with Oklahoma Indian land issues, federally-owned tribal trust land in Oklahoma is a reservation for purposes of Indian Country status. The argument of the Oklahoma Tax Commission that the trust land of the Potawatomi Tribe is "off-reservation" land, and therefore subject to complete state jurisdiction, is based upon faulty legal and historical analysis and should be rejected by this Court.

The Court should also reject the State's invitation to overturn the doctrine of tribal sovereign immunity from unconsented suit. Both Congress and the federal courts have long recognized that Indian tribes may not be sued absent an explicit congressional or tribal waiver of that immunity. Because that principle is inextricably tied to federal Indian policies promoting tribal autonomy and economic self-sufficiency, any weakening of that doctrine would have very serious consequences for tribal governments across the country. As a result, any decision to diminish the scope of tribal sovereign immunity from suit should be left to Congress. In the absence of such congressional determination, this Court should affirm the judgment of the court below dismissing the Tax Commission's counterclaim against the Potawatomi Tribe.

ARGUMENT

I. TRIBAL TRUST LAND IN OKLAHOMA IS A "RESERVATION" AND THEREFORE "INDIAN COUNTRY" AS DEFINED AT 18 U.S.C. §1151(a)

Central to much of the State's argument in this case is the contention that the activities of the Potawatomi Tribe at issue here occurred "off the reservation." The State's repeated references to and discussion of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and its efforts to distinguish *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), are all predicated on the assumption that the Potawatomi tribal land held in trust by the United States in this case does not constitute a "reservation" for jurisdictional purposes.[1]

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[1] In those companion cases, the Court set forth two broad principles of federal Indian law: that state laws generally are not applicable to tribal activities on an Indian reservation except to the extent that Congress has expressly authorized the application of state law, *McClanahan*; but that a tribal enterprise conducted off the reservation may be subject to non-discriminatory state taxation. *Mescalero*.

Although the Tax Commission never says so directly, the importance of the "on-reservation" versus "off-reservation" distinction is to determine whether the Potawatomi tribal lands are "Indian Country." That term, as defined at 18 U.S.C. §1151(a), includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government. . ." and applies to questions of both criminal and civil jurisdiction. *California v. Cabazon Band*, 480 U.S. at 207, n.5. Indian Country generally denotes those areas within which federal and tribal jurisdiction are paramount, and state authority is extremely limited or non-existent. *See generally DeCoteau v. District County Court*, 420 U.S. 425, 427 and n.2 (1975). Therefore, in determining the extent of the State's regulatory authority in this case, the threshold question is whether or not the tribal trust land on which the Potawatomi Tribe is conducting its activities is an Indian reservation within the meaning of §1151(a), and, hence, Indian Country.

A. An Unbroken Line of Authority From This Court and the Tenth Circuit Has Held That Land Set Apart by the United States and Held in Trust for an Indian Tribe is a Reservation for Indian Country Purposes Under §1151(a).

Not surprisingly, the State has not cited or discussed a single case which analyzes the scope of Indian Country under §1151(a). The reason for this glaring omission is obvious, however. The most cursory review of the case law from this Court and from the Tenth Circuit Court of Appeals quickly reveals that land held in trust by the United States for the benefit of a federally recognized Indian tribe, however it may otherwise be designated, constitutes a "reservation" for purposes of §1151(a).

This is not to suggest that the term "Indian reservation" has had one fixed or immutable meaning through time or for all purposes. In fact, the leading treatise on federal Indian law devotes four pages to discussing the origin, development and

different usages of the term over time and in different contexts. Felix Cohen's *Handbook of Federal Indian Law*, 34-38 (1982 ed.) (hereafter "Cohen"). Whatever its historical roots, however, there is now general agreement that the term "Indian reservation" as used in §1151(a) simply means land validly set apart for the use of Indians under the authority of the federal government, regardless of how the land achieved that status. *See United States v. John*, 437 U.S. 634, 648-49 (1978) (quoting *United States v. Pelican*, 232 U.S. 442, 449 [1914]); Cohen at 34 and n.66.

It is immaterial that the word "reservation" may not have been used when the land at issue here was set apart for tribal use by the United States. This Court so concluded more than fifty years ago in *United States v. McGowan*, 302 U.S. 535, 538-39 (1938). In that case, the Court determined the status of a small tract of land purchased by the federal government and held in trust for homeless Nevada Indians. The land had never been formally designated as a "reservation" by Congress, but instead was characterized as the "Reno Indian Colony." The Supreme Court rejected the argument that the land was not Indian Country because it had never been expressly set aside as a "reservation." Instead, the Court held:

> Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations' . . . and it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'

Id. As a result, the Court concluded that "it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian Country.'" *Id.* at 539.

Forty years later, the Court reached a similar conclusion in *United States v. John*, 437 U.S. 634 (1978). In that case, this Court reversed a judgment of the Mississippi Supreme Court and ruled that certain land held in trust by the federal government for the Mississippi Band of Choctaw Indians was a

"reservation" within the meaning of §1151(a), despite the lack of a formal designation as such by Congress. The Court relied on *McGowan* and *United States v. Pelican*, 232 U.S. 442 (1914), in which reservation status had been based on a finding that the subject lands "had been validly set apart for the use of the Indians, as such, under the superintendence of the Government." *Id.* at 449. As a result, the Court in *John* found that the land held in trust for the Mississippi Choctaws, as a federally recognized Indian tribe, was a "reservation" and therefore "Indian Country" under §1151(a).

In addition to these cases, the Tenth Circuit Court of Appeals has repeatedly held that tribal trust lands in Oklahoma are Indian reservations for purpose of §1151(a). The court of appeals did so first in *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 666-68 (10th Cir. 1980), primarily on the strength of *United States v. John*. In that case, the court held that lands set apart and held in trust for the tribe under a variety of different federal statutes all constituted Indian Country under §1151(a). More recently, the Tenth Circuit has subjected the question to even more rigorous analysis, and reached the same conclusion in a case involving the petitioner here. *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied* _____ U.S. ___, 108 S.Ct. 2870 (1988).

In *Indian Country U.S.A.*, the Creek Nation of Oklahoma and an affiliated company sought declaratory and injunctive relief against the Oklahoma Tax Commission. The Commission alleged that it had complete jurisdiction over a Creek tribal bingo enterprise being conducted on Creek lands, including the right to tax and regulate the tribal games. The State argued that the tribal activities were not being conducted within Indian Country, or, alternatively, that even if they were, the State had complete jurisdiction nevertheless.

The appellate court rejected both arguments. In so doing, it carefully analyzed the scope, history and purpose of §1151(a), and the cases of this Court that have interpreted it. 829 F.2d

at 973-76. After doing so, the court of appeals had no difficulty in finding that the tribal lands at issue in that case were Indian Country under §1151(a), as having been set apart by the federal government for the use and benefit of the Creek Nation.

As a result, the State's argument that the present case is controlled by *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) is without merit. That case generally held that tribal activities occurring off the reservation may be subject to state taxation. However, as just discussed, that is not the case here. In *Mescalero*, the land on which the tribe had constructed its ski resort was outside of the tribe's reservation boundaries, and was simply leased from the U. S. Forest Service under a 30 year lease. *Id.* at 146 (land was "adjacent to the reservation"). In addition, there is no indication that the tribe exercised governmental authority over that leased land. Although not acquired in trust for the tribe, the Court summarily concluded that this lease arrangement was sufficient to bring the tribe's interest in that land within the immunity afforded by 25 U.S.C. §465. The Court then held that §465, which has no relevance to the case at bar, did not exempt the tribe's income, derived from that off-reservation leased land, from state taxation. Beyond this cursory analysis, however, the Court made no effort to define the status of the leased land. In particular, the Court did not determine whether the land was "Indian Country" because §465 does not use that term or require that finding.

By way of contrast, the land at issue in this case is actually set apart and held by the United States in trust for the Potawatomi Tribe, and lies within the tribe's historical reservation boundaries.

As these cases amply demonstrate, then, the State is simply ignoring well-established precedent when it argues that the Potawatomi tribal activities at issue in this case should be regarded as "off-reservation" activities for jurisdictional purposes. In fact, these tribal trust lands plainly constitute a reservation and Indian Country under 18 U.S.C. §1151(a), and the court below was correct in so holding.

B. The State's Argument Concerning The Supposed Disestablishment of All Indian Reservations in Oklahoma is Unpersuasive and Incorrect.

To buttress its argument for state jurisdiction over all Indian lands in Oklahoma, the Tax Commission devotes a substantial portion of its brief to the contention that all Indian reservations in Oklahoma had been disestablished and all tribal lands brought under state jurisdiction by the time of Oklahoma's admission to the Union. Tax Commission's Brief at 9-21.

This very argument has been rejected by the Tenth Circuit, after careful analysis, in two recent cases. *Indian Country, U.S.A.*, 829 F.2d at 976-81; *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 712 and n.2 (10th Cir. 1989). The State's disestablishment argument is unpersuasive for several other reasons, as well. First, and perhaps most simply, it is contrary to Congress' clearly expressed intent. The State's assertion that "Congress has since recognized that no reservations survived past statehood," Tax Commission's Brief at 17-18, is best repudiated through Congress' own words. In 1936, Congress enacted the Oklahoma Indian Welfare Act (OIWA) 25 U.S.C. §501 *et seq.*, to specifically address the status of Oklahoma tribes. That statute, passed approximately 30 years after the State alleges that all reservations in Oklahoma had been terminated, authorized the Secretary of the Interior:

> . . . to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands *within or without existing Indian reservations*, including trust or otherwise restricted lands now in Indian ownership . . . .

25 U.S.C. §501 (emphasis added). It seems difficult to understand why Congress would have referred to "existing Indian reservations" in 1936 if all reservations had been eliminated before 1906. The reason, of course, is that all

reservations in Oklahoma had *not* been terminated, and Congress clearly understood that fact.

The Tax Commission has cited legislative history of the OIWA to support a contrary conclusion. Like much of the State's authority, however, it is fatally flawed. The State cites and quotes from S. Rep. No. 1232, 74th Cong. 1st Sess. (1935), which, it says, is the Senate Report accompanying the Oklahoma Indian Welfare Act of 1936. Tax Commission's Brief at 18. However, that Report did *not* accompany the OIWA. In fact, it was the Report on an earlier version of the legislation that was rejected by Congress. It was in the next session of Congress that the OIWA was enacted, and in H. Rep. No. 2408, 74th Cong. 2d Sess. (1936), which deals with the enacted version, there is a discussion of the problems in the earlier version and the intent of Congress in enacting the version that it did. In this later Report, it is stated:

> During the last session of Congress the Committee on Indian Affairs had before it H. R. 6234, a bill similar in purpose but containing many objectionable features. The Senate bill, as passed by the Senate on August 16, 1935, embodied some of the objectionable provisions. The committee has therefore devoted considerable time to a study of the legislation satisfactory to the Indians, to the Department, and to the Congress itself. This bill, in its revised form, has the endorsement of the Department; it has been advocated by representatives of numerous Indian groups; it is unanimously favored by the Oklahoma delegation in the House, and was unanimously reported by your committee.

The Report continued:

> Sections 3, 4, and 5 extend to the Oklahoma Indians the right to organize; to adopt constitutions; to receive charters; and to participate in loan funds and

> otherwise to enjoy the benefits of organization for general welfare purposes. In other words, these sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934.

From this commentary it is apparent that Congress intended the Indian tribes of Oklahoma to enjoy the same general status as tribes elsewhere in the United States; a status that, by definition, requires a secure land base over which the tribe can exercise governmental authority. It would have been a hollow gesture, at best, for Congress to have extended powers of tribal organization and self-government to Oklahoma tribes under the OIWA, but for them to be denied that authority and be fully subject to state jurisdiction because their trust lands failed to constitute "Indian Country." By specifically designating them as "reservations" in the statute, it is clear that Congress fully intended to avoid the result proposed by the Tax Commission in this case.

Second, the State's argument is irrelevant. As this Court has noted, disestablishment of reservation boundaries primarily affects the jurisdictional status of *non-Indian* owned lands within the reservation; tribal lands and trust lands within the original boundaries retain their "Indian Country" character despite disestablishment. *Solem v. Bartlett*, 465 U.S. 463, 467, n.8 (1984); *DeCoteau v. District County Court*, 420 U.S. at 428. This Court has never held that lands currently held in trust by the United States for an Indian tribe within the boundaries of a disestablished or diminished reservation are subject to state jurisdiction.

The Tenth Circuit, with substantial experience in dealing with Oklahoma Indian law issues, has followed the same line of reasoning. *Indian Country, U.S.A.*, 829 F.2d at 975, n.3. So, too, in *Cheyenne-Arapaho Tribes v. State of Oklahoma*, the court of appeals presumed that the original reservation may have been disestablished by congressional action. 618 F.2d at 667.

Nevertheless, the court found that lands within the original reservation boundaries which were now held in trust for the tribes, retained their reservation status for purposes of §1151(a). *Id.* at 668.

The same principle applies here. It makes no difference in this case whether the original Potawatomi Reservation was disestablished or diminished. If the lands on which the current tribal activities are taking place are within the boundaries of the original reservation (which they are) and if those lands are presently held in trust by the United States for the Potawatomi Tribe (which they are) those lands retain their Indian Country status under §1151(a), and are not subject to general state jurisdiction.

The State's reliance upon, and the conclusion it draws from, the Dawes Commission Reports are also unwarranted. These were reports *to* Congress, not reports *by* Congress. Therefore, they are of very limited value in attempting to ascertain what Congress actually did insofar as any particular reservation is concerned.

In addition, the reports were simply wrong to the extent that they advised Congress that one result of the Dawes Commission's activities had been the abolition of all tribal governments within the Indian Territory. Such a view has been specifically rejected both by contemporary federal courts, *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C. 1976) *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C.Cir. 1978), and by authoritative Indian law commentators. Cohen at 779-80, 781-84.

As a result, the State's position here that "the allotment of the land and the effacement of the tribal governments were successfully obtained," and that "the [Dawes] Commission had accomplished the reconstruction of the Territory in order to replace the several tribal governments with a constitutional state government," Tax Commission's Brief at 15, must be viewed merely as wishful thinking rather than legal reality. In fact, the "evidence" relied upon here by the Tax Commission fails to

establish that all Oklahoma reservations and tribal governments, including those of the Potawatomi Tribe, have ever been terminated.

To support its unprecedented position here, the Tax Commission also suggests that Oklahoma Indian tribes are entitled to less federal protection than other tribes because Oklahoma Indians have ostensibly been assimilated into the non-Indian population. Tax Commission's Brief at 18-21.

The Court has already rejected this very argument in *United States v. John*, 437 U.S. 634 (1978). In that case, as here, the state argued that because "the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State," *id.* at 652, they were not entitled to federal protection and were fully subject to state law. The Court disagreed, and held that continued federal recognition of the tribe as a tribe, rather than the degree to which individual members may or may not be assimilated into the non-Indian community, determines the extent to which federal and tribal, rather than state, jurisdiction applies on tribal trust land. *Id.* In addition, as was the case in *John*, the record before this Court is absolutely devoid of any persuasive evidence whatsoever to establish the "fact" that the Potawatomi Tribe, or any other Oklahoma tribe, has been fully assimilated into the non-Indian community, or that Oklahoma Indian tribes are any more or less assimilated than tribes of any other state. Rather than provide empirical evidence, expert testimony or the like, the Tax Commission would have the Court make this far-reaching determination on the basis of several sentences of dicta from *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943).[2]

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[2] Cohen discusses *Oklahoma Tax Commission* in the broader judicial context in which it arose, Cohen at 421-24, and concludes that while "the result was not an abrupt change of doctrine . . . the plurality opinion relied on broad reasoning going well beyond the immediate issue." *Id.* at 422. The

Oklahoma Tax Commission, when fairly analyzed, does not support the unprecedented position for which the State cites it here. First, the language quoted by the Tax Commission in its brief did not even command the support of a majority of the Court. Justice Black wrote the plurality opinion, from which the State quoted, for four members of the Court, while an equal number joined the dissent. Justice Douglas concurred in the result and disposition, but without any indication that he adopted the patronizing language upon which the State focuses here.

Equally as important, this language, when read in context, does not support the State's argument in any event. Even given the broadest possible reading, it cannot be said that a majority of the Supreme Court was saying in 1943 that all Indian tribal governments within the State of Oklahoma had ceased to exist as a legal matter. Rather, the Court seemed to be commenting on what it viewed as the dormant and largely inactive state of those governments at that time and for some unspecified period in the past. However, both the plurality and dissenting opinions expressly recognized that the Oklahoma Indian Welfare Act of 1936 was intended and had begun to revitalize Oklahoma tribes. 319 U.S. at 603, n.5 ("under [the OIWA] some progress has been made in the restoration of tribal government"); *id.* at 613, n.1 ("They still exist . . . and have recently been authorized to resume some of their former powers" [citing the OIWA]).

The brief, unflattering description of the status of Oklahoma tribes as of 1943 contained in *Oklahoma Tax*

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question involved in that case concerned the application of state inheritance taxes to the property of individual Indians. The Court's commentary on the status of Oklahoma tribal governments at that time, wholly unsupported by any factual information, was not necessary to decide the issue then before the Court.

Commission is not unlike the well-documented history of the Mississippi Band of Choctaws outlined in *United States v. John*, 437 U.S. at 639-46. As *John* makes clear, however, the facts that an Indian tribe may be only the remnant of a once larger group, that its government may have lain dormant for years, that its members may have been granted state citizenship and that the Bureau of Indian Affairs may have periodically abandoned its supervisory role and permitted a state to exercise unauthorized jurisdiction over the tribe and its property, do not mean that tribal existence has been terminated or that tribal powers, if and when the tribe chooses to exercise them, have been diminished. *Id.* at 652-54. Certainly nothing in the dicta quoted by the State from *Oklahoma Tax Commission* suggests a different result with respect to Oklahoma Indian tribes.

To the contrary, the facts and the legal principles applicable in this case require the conclusion that the Potawatomi lands at issue here are a "reservation" and constitute "Indian Country" within the meaning of 18 U.S.C. §1151(a). If this is so, then the State's reliance on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) and its broader position that all tribal trust land in Oklahoma is "off-reservation" land must also be rejected. Accordingly, that portion of the decision below should be affirmed.

II. THE TAX COMMISSION'S COUNTERCLAIM WAS PROPERLY DISMISSED UNDER THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY FROM SUIT

The Tenth Circuit properly dismissed the Oklahoma Tax Commission's counterclaim seeking affirmative relief against the Potawatomi Tribe. The doctrine of tribal sovereign immunity from unconsented suit is well established in this Court and its validity has been expressly recognized by Congress. The State has offered no compelling reason why this important doctrine should suddenly be abandoned. Moreover, even if the principle of tribal sovereign immunity should be reexamined, that task should be left to Congress, in the exercise of its plenary

authority over Indian affairs.

A. The Potawatomi Tribe, Like All Federally Recognized Tribal Governments, Enjoys Sovereign Immunity From Unconsented Suit

It is a basic tenet of federal Indian law that Indian tribes enjoy sovereign immunity from suit. Just as the United States may not be sued without its consent, *United States v. Testan*, 424 U.S. 399 (1976); *United States v. Sherwood*, 312 U.S. 584 (1941), it is axiomatic that an Indian tribe may not be sued in either federal or state court unless Congress or the tribe consents to such suit, and such consent must be unequivocally expressed. In applying this principle, the court below relied on a long, unbroken line of authority. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 171-73 (1977); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 513 (1940); *Turner v. United States*, 248 U.S. 354, 357-58 (1919); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 714 (10th Cir. 1989); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F. Supp 55 (N.D. Cal. 1979), *aff'd*, 757 F.2d 1047, 1051 (9th Cir. 1985) *rev'd on other grounds*, 474 U.S. 9 (1987); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); *Ramey Construction Company v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319-20 (10th Cir. 1982).

Tribal sovereign immunity from suit is jurisdictional. Absent an effective waiver, the assertion of sovereign immunity by a federally recognized Indian tribe deprives a court of jurisdiction to adjudicate the claim, and the only proper disposition is dismissal of the action. *United States v. United States Fidelity and Guaranty*, 309 U.S. at 512 ("These Indian Nations are exempt from suit without Congressional authorization . . . . Absent that consent, the attempted exercise of judicial power is void"); *see also Puyallup Tribe Inc. v.*

Department of Game, 433 U.S. at 172 ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe").

Tribal sovereign immunity is rooted in the unique historical relationship between Indian tribes and the United States government: tribes are immune from suit because they are sovereigns predating the Constitution and because such immunity is necessary to preserve their autonomous political existence. *Chemehuevi Indian Tribe*, 757 F.2d at 1050-51; *see also United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981). Moreover, it has long been held that tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources. *Maryland Casualty Co. v. Citizens National Bank of North Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895); *Cogo v. Central Council of Tlingit and Haida Indians*, 465 F. Supp. 1286 (D. Al. 1979). *See generally Atkinson v. Haldane*, 569 P.2d 151, 157-63 (Alaska, 1977) (discussing public policy bases for tribal sovereign immunity).

Congress has also expressly recognized the doctrine of tribal sovereign immunity. In enacting the Indian Self-Determination Act of 1975, 25 U.S.C. §450 et seq., Congress explicitly stated that nothing in that Act was to be construed as "affecting. modifying, diminishing or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. §450n. The fact that Congress would so clearly state its intention to protect tribal sovereign immunity plainly indicates its belief in the continued validity and importance of this well established principle.

Finally, the policy concerns that underlie tribal sovereign immunity are as relevant today as they have ever been. As succinctly summarized by this Court in its most recent discussion of the subject, "[t]he common law sovereign immunity possessed by the Tribe is *a necessary corollary to Indian sovereignty and*

self-governance. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986) (emphasis added). In short, tribal immunity from suit is not an antiquated doctrine, as suggested by the State, but rather continues to serve important federal Indian policies.

B. Tribal Sovereign Immunity Also Extends to Counterclaims

The Tenth Circuit correctly held that the Potawatomi Tribe's sovereign immunity extends not only to original actions, but also to counterclaims seeking affirmative relief against the tribe. This general principle of sovereign immunity is well established. *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U.S. 493, 505 (1918); *accord, U. S. v. Shaw*, 309 U.S. 495 (1940). The same principle applies to cross-complaints or counterclaims brought against an Indian tribe. In *United States v. United States Fidelity and Guaranty Co.*, this Court concluded that:

> [p]ossessing this immunity from direct suit, we are of the opinion [that a tribe] possesses similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective.

309 U.S. at 513.

Nor can the Tax Commission persuasively argue that Rule 13(a) of the Federal Rules of Civil Procedure, authorizing compulsory counterclaims in civil actions, constitutes a congressional waiver of sovereign immunity. That contention has been repeatedly rejected by a host of federal courts. *United States v. Longo*, 464 F.2d 913 (8th Cir. 1972); *United States v. Wilson*, 523 F. Supp. 874, 900, n.22 (N.D. Iowa, W. D. 1981); *United States v. Drunkwater*, 434 F. Supp. 457, 460 (E.D. Va 1977); *United States v. Edena*, 372 F. Supp. 1317, 1319 (D.S.C. 1974); *see also* 6 C. Wright and A. Miller, *Federal Practice and Procedure*, Civil §1427, p. 139 (1971). As the court below also

noted, it has likewise been rejected in the context of tribal sovereign immunity. *Chemehuevi Indian Tribe*, 757 F.2d at 1053.

Finally, the Tenth Circuit correctly held that the narrow recoupment exception to sovereign immunity, *see Bull v. United States*, 295 U.S. 247, 261 (1935), was inapplicable to this case. The recoupment exception permits a counterclaimant to reduce the amount of money damages sought by the government under certain circumstances, but does not permit an award of affirmative relief against the governmental entity. *United States v. Agnew*, 423 F.2d 513 (9th Cir. 1970); *see also Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967). Where, as here, the tribe's complaint sought only injunctive relief, the recoupment exception cannot be construed to authorize a counterclaim against the Potawatomi Tribe seeking affirmative declaratory or monetary relief.

C. The Enforcement Problems of Which The Tax Commission Complains Are Theoretical At Best And Do Not Warrant Abolishing Tribal Sovereign Immunity

The Tax Commission has invited the Court to overrule the longstanding doctrine of tribal sovereign immunity because, the Commission says, its interest in collecting state taxes by judicial means outweighs the principles of tribal autonomy and self-government that the doctrine protects. Tax Commission's Brief at 27-39. That contention, however, is both speculative and incorrect.

Federal courts, including this Court, have routinely rejected arguments that tribal sovereign immunity should be ignored because of practical problems caused by its enforcement. For example, in *Chemehuevi Indian Tribe v. California State Board of Equalization*, the State of California filed a counterclaim against the tribe seeking monetary relief for unpaid cigarette taxes. In dismissing the state's counterclaim, the district court noted that:

> [t]he Tribe's sovereign immunity might create practical difficulties for the Board in attempting to enforce its cigarette tax laws against the tribe, but these potential enforcement problems cannot override the Tribe's claim of sovereign immunity.

492 F. Supp 55, 61, (N.D. Cal. 1979), *aff'd*, 757 F.2d 1047 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1987).

This Court has taken the same position in other contexts. For example, in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) the Court dismissed the state's action against the tribe seeking to regulate tribal fishing activities on the basis of sovereign immunity. In so doing, the Court clearly recognized the practical enforcement problem that its decision to deny the state relief against the tribe would create. Nevertheless, the Court found these considerations to be inadequate to override the tribe's assertion of immunity in that case. *Id.* at 178.

More recently, the Court upheld the doctrine of tribal sovereign immunity against allegations that the State of North Dakota could deny access to its courts unless tribes in that state agreed to waive their immunity from suit. In rejecting this contention, the Court stated:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

Three Affiliated Tribes v. Wold Engineering, 476 U.S. at 893.

Thus, enforcement problems occasioned by the assertion of tribal sovereign immunity from suit have never been deemed to warrant any impairment of that doctrine.

The Tax Commission further argues that tribal sovereign immunity should be abolished with respect to commercial activities involving a tribe and non-Indians. That assertion also is clearly without merit. *United States v. United States Fidelity and Guaranty Co.*, one of the seminal cases in this area, involved a commercial lawsuit over coal leases between the Choctaw and Chickasaw Tribes and a non-Indian coal company and its surety. Likewise, *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, involved a dispute between the Seminole Tribe and a contractor over a construction project. The Eighth Circuit Court of Appeals held that a limited waiver of tribal sovereign immunity shielded certain tribal assets from garnishment proceedings. In reaching this conclusion, the court noted:

> The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection.
>
> * * *
>
> To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians.

361 F.2d at 521-22. The fact that the present case involves a commercial venture by the Potawatomi Tribe in no way diminishes its sovereign immunity from unconsented suit.

Finally, even if this Court should decide that the

Potawatomi Tribe must collect state taxes on its sales to non-members, the Tax Commission has failed to show any compelling reason why the principle of tribal sovereign immunity should be abandoned. There is no evidence that the Potawatomi Tribe, or any other Oklahoma tribe, would ignore such a direct ruling by this Court. In addition, the State has alternative means to enforce tribal compliance with any such ruling. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court authorized state seizures of untaxed cigarettes off the reservation, stating that "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." *Id.* at 162. There is no evidence before the Court that this enforcement mechanism has not proven adequate in the State of Washington. As a result, the Tax Commission's argument that such seizures, or even the threat of such seizures, would not prove effective in Oklahoma, is entirely speculative. Certainly, the Court should not reverse the longstanding line of authority upholding tribal sovereign immunity, which would have the effect of severely intruding on "core tribal interests," on the basis of such conjecture.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, the Court recognized that tribal immunity from suit, like all other aspects of tribal sovereignty, "is subject to the superior and plenary authority of Congress." *Id.* at 58. To date, Congress has acted to preserve and protect tribal sovereign immunity. 25 U.S.C. §450n. To the extent that the question bears reexamination, it is for Congress and not the judiciary to make that determination. Unless and until Congress acts to diminish this aspect of tribal sovereignty, this Court, like the court below, should uphold the doctrine of tribal sovereign immunity as an essential element of federal Indian law.

CONCLUSION

The Oklahoma Tax Commission is asking the Court to adopt broad, unprecedented positions that go well beyond what

is necessary to decide the narrow tax issue presented in this case. The Tenth Circuit properly decided that the Potawatomi tribal trust land was "Indian Country" under 18 U.S.C. §1151(a) and that the State's counterclaim against the tribe must be dismissed on the basis of tribal sovereign immunity. Those decisions were correct and we respectfully urge that they be affirmed.

Respectfully submitted,

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No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE, THE INTER-TRIBAL COUNCIL OF THE FIVE CIVILIZED TRIBES, IN SUPPORT OF RESPONDENT

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This brief amicus curiae is filed, in support of respondent, by the Inter-Tribal Council of the Five Civilized Tribes, with the consent of both parties.

INTEREST OF AMICUS CURIAE

Petitioner Tax Commission has advanced a broad, wide-ranging and unprecedented theory that trial sovereignty has been extinguished in Oklahoma. Consequently, it contends there is no Indian country left therein and that the state law has wholesale application to all Indian people, tribal governments and Tribal lands in Oklahoma. Moreover, petitioner contends that this Court should overrule long established precedent and find that congress lacks constitutional authority to shield Indian tribes from unconsented suits insofar as this Court has placed that interpretation on 18 U.S.C. § 1151.

The Inter-Tribal Council of the Five Civilized Tribes was organized on February 3, 1950, and is comprised of the Choctaw Nation of Oklahoma, the Cherokee Nation of Oklahoma, the Chickasaw Nation, the Seminole Nation of Oklahoma, and the Muscogee (Creek) Nation, which were removed to Oklahoma in the early nineteenth century under inauspicious circumstances which are now well known. See e.g. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 622-626 (1970). These member tribes of the Inter-Tribal Council, are not only largest in Oklahoma but among the largest in the United States. Their combined membership exceeds 250,000 members.

Encouraged by the federal government, each of the Five Civilized Tribes exercise a broad range of self-governing powers within lands held in trust for them by the United States and are engaged in various forms of economic development activities which generate revenues used to provide tribal programs and services for their members. They do not request nor do they receive assistance from the State of Oklahoma in the furtherance of these activities. The tribal powers of self government and efforts at economic self-sufficiency by Indian tribes across the nation would be seriously undermined if this Court were to accept the legal arguments and factual assertions advanced by the Oklahoma Tax Commission in this case.

One member of the Inter-Tribal Council, the Chickasaw Nation, is presently engaged in litigation which is now pending before the Oklahoma Supreme Court. *State of Oklahoma, ex rel, Oklahoma Tax Commission v. Chickasaw Nation*, No. 73729. That litigation has already visited this Court on two occasions wherein petitioner made the same arguments as made here. In *Oklahoma Tax Commission v. Graham*, 108 S.Ct. 481 (1987) sub. nom. this Court reversed the Tenth Circuit Court of Appeals and remanded for reconsideration of whether the case was properly removed from the state district court in which the suit had been originally filed. On reconsideration the Circuit Court again found federal question removal jurisdiction present and affirmed dismissal of the state's complaint on the ground of tribal sovereign immunity from unconsented suit. 846 F.2d 1258. This Court, again reversed and ordered remand to the state court on the procedural question without addressing the substantive issue of sovereign immunity except to recognize it as a

defense, 109 S.Ct. 1519 (1989). On remand, the state district court, following this and every other federal Court's long established teachings, ordered the case dismissed on the ground the neither the Congress nor the the Chickasaw Nation had consented to the suit and that it was barred by sovereign immunity. The Tax Commission's appeal to the Oklahoma Supreme Court is pending. In that case, as in this one, the Tax Commission is arguing that Oklahoma state laws apply to tribal activities within "Indian country", 18 U.S.C. § 1151, because Indian county in Oklahoma is somehow different than Indian country in every other state. In other words it attempts to convince the Oklahoma Supreme Court that it should be allowed to play by a different set of rules than is required by its counterparts in other states. However, in the instant case, the Tax Commission is more ambitious because the relief sought is much broader and would sweep away tribal sovereignty of Indian tribes all across the nation.

Because the position urged by the petitioner virtually threatens the very existence of the tribal governments it represents, the Inter-Tribal Council has a substantial interest in opposing this attack on their sovereignty.

SUMMARY OF ARGUMENT

The State of Oklahoma's unprecedented history of antagonism to its Indian population is well documented. Most tribes in Oklahoma, forced from their ancient homelands east of the Mississippi River to a hostile, sometimes barren, land in the early nineteenth century began to carve out new lives for themselves pursuing historical

cultures and governing themselves under democratic forms of government modeled after that of the United States. But, seventy-five years later they were again visited by the dominant society's imperialistic and voracious appetite for land. Thus, began the individual allotment process under the guise of saving these Indian tribes from themselves and protecting them from unscrupulous white men. It proved to almost be a perfect bloodless destruction of these peoples as organized societies. However, what was left unsaid but understood by all is that these Indian people had no concept of individual ownership of land nor any concept of its value to them as an individual. In a few short years, with the shameful assistance of the Oklahoma state court system approving purchases of individual allotments for sums tantamount to outright theft, permitting white men to purchase lands allotted to orphaned children over whom they had been appointed guardians and other such unsavory practices, this once proud Indian population was virtually without any land base.

Yet, for many years these tenacious peoples continued to cling to their cultures, for the most part ignored by the dominant society, particularly Oklahoma's state government, until more recently when the federal government began to assist them in restoring their shambled governments and promoting economic development. While these tribes have begun to prosper and enter the mainstream of commerce under these federal policies, greatly improving the lives of their people, they have also rekindled the fires of antagonism of Oklahoma's state government that had been smoldering embers for so many years. It being the accepted nature of the bureaucracy to want to tax and regulate everything and

everybody, various agencies of the state have embarked on a program to reduce tribal governments to mere social organizations completely under state domination. But for the federal judiciary their mission would have, by now, been successful.

Amicus, in support of respondent, will resist the tax commission's extraordinary claim that no Indian country exists in Oklahoma; that sovereign immunities should be judicially abolished; that "the sovereignty doctrine is not useful this day"; that the "correct approach is to strike down the Tribe's immunity defense" when it is asserted against state taxation and regulation. (Pet. Br. 6, 29) Further, amicus rejects the tax commission's characterization of the Dawes Commission efforts as "statesmanship"; its unflattering reference to tribal economic development as being "with the singular ambition of fulfilling its [the tribes'] lust for lucre"[1] and its belittling, cavalier description of the respondent tribe as "merely a defeasible vestige of history." (Pet. Br. 32, 33, 39)

Further, amicus will resist the tax commission's argument, its irrelevance aside, that the historical reservation boundaries of most Oklahoma tribes have been abolished by congress. In any event, that issue is immaterial because the standard for allocating tribal, federal vis-a-vis state jurisdiction for purposes of taxation and regulation is now governed by the more modern criteria of whether the lands are "Indian country" as defined by

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[1] This brings to mind the old adage of the pot calling the kettle black in light of petitioner's attempt to gain entry to the Potawatomies' treasury for almost three million dollars.

decisions of this Court and acts of congress. Moreover, it will be shown that tribal sovereign immunity from unconsented suit is essential to tribal autonomy and the federal trust relation and is a settled principle independent of geographical considerations. Amicus also believes that because such considerations are exclusively within the plenary powers of the legislature the issue of tribal immunity from suit and taxation is a non-justiciable political question.

Finally, amicus will assert that the tax commissions' counterclaim was appropriately dismissed and its attempts to apply Oklahoma's state taxes against the tribe was properly enjoined.

ARGUMENT

I. NOTWITHSTANDING ITS LACK OF RELEVANCE TO SOVEREIGN IMMUNITY PETITIONER'S RESERVATION DISESTABLISHMENT ARGUMENT IS WITHOUT MERIT

Relying on an antiquated concept of the term "reservation" from a century ago rather than modern day definition of state versus federal-tribal jurisdictional allocations governed by whether a particular area is "Indian country", petitioner asserts the novel, indeed lonely, theory that there are no tribal lands in Oklahoma over which the state does not have authority.[2]

[2] Under this theory Oklahoma's Indian tribes would not be the only tribes subjected to state jurisdiction. There are many tribes in other states whose lands have been allotted in severalty and historical reservation settled by non-Indians.

Petitioner's sweeping proposition to limit tribal sovereign immunity from state laws and unconsented suit based on territorial or geographical considerations is absolutely without precedent. This labored effort is aimed at bringing this matter within the ambit of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), a case that neither involved Indian country as defined by 18 U.S.C. §1151 or where sovereign immunity from suit was at issue.

A. Respondent's Reservation Boundaries Have Not Been Abolished

While most, if not all, reservations, as that term was perceived before the turn of the century, in Oklahoma have been significantly diminished by acts of congress and the allotment process only the boundaries of the Ponca and Otoe and Missouri have been explicitly abolished. 33 Stat. 218.[3] After the passage of the General Allotment Act of 1887 [also known as "The Dawes Act", 24 Stat. 388] congress provided for allotments with the surplus to be sold to settlers. 26 Stat. 1016. There was, however, reserved "any land heretofore set apart in said tract of country for any use by the United States, or for school, school farm or religious purposes" that was not allotted or sold. The lands on which the activities that precipitated this litigation is a part of those lands reserved.

[3] Provides that "the reservation lines of the said Ponca and Otoe and Missouri Indian reservations be, and the same are hereby, abolished."

It is true that the United States government during the assimilationist period engaged in a policy leading to termination of Indian tribes. However, as has been noted by most historians and scholars, this was a sad period in American history and is a poor background on which to ask this Court to revisit those policies on Indian tribes and to extract such vital aspects of their well-recognized sovereignty.

The Tax Commission relies heavily on the reports filed by the Dawes Commission, which, of course, had nothing to do with respondent's lands, as proof that congress intended to abolish all Indian reservations in Oklahoma. It states that these reports give "an accurate first-hand account of the conditions existing throughout the Indian Territory" (Pet.Br. at p.14) which "form a basis to develop an understanding" that congress intended by the allotment process to abolish the Oklahoma reservations. It further allows how the "statesmanship" practiced by the Dawes Commission "dismantled" tribal sovereignty which should come to quite a surprise to most courts. (Pet.Br. at p.39)

Amicus suggests that a more vivid illustration of the Dawes effort is provided by the noted Indian scholar and author, Angie Debo, in her critically acclaimed book, *And Still the Waters Run*, Princeton (1940) at page 91:

> " . . . As the federal officials began to realize the vast helplessness and inexperience of the average Indian, they began, through a blundering process of experimentation, to try to guard his property. But because of the lack of a definite and constructive policy, and most of all because the inherent difficulty of the task itself, the general effect of allotment was an orgy of plunder

> and exploitation probably unparalleled in american history."

Another leading Indian scholar, historian and author of the times commented on the reports of the Dawes Commission that claimed it was the fault of the Indians and their "non-American" (Pet.Br. at p.15) system that necessitated the break-up of the reservations. James H. Malone, *The Chickasaw Nation*, John P. Morton & Co. (1922):

> "The truth is that when the Five Civilized Tribes were driven from their ancient homes east of the Mississippi to make room for the early settlers, the country selected for them, and called the Indian Territory, was thought to be a wild and barren country and was then subject to the inroads of the wild roving bands of the plain Indians, making life there insecure. After these savages were conquered and the country made secure and habitable by the Five Civilized Tribes, not only the great agricultural possibilities of the country became a striking fact, but, in addition, vast deposits of coal, oil, and gas were discovered. Then it was that, whetted by cupidity, the whites became as hungry wolves, seeking all they could devour, and intruders overran the Indian country, while the United States, which acknowledged the helplessness of the Indians, and its duty by treaty and morally to exclude the intruders, with the power so to do, quietly looked on and did nothing. Hence the Dawes Commission."

Angie Debo, also commented on the credibility of the Dawes Commission in her work, *A History of the Indians of the United States*, University of Oklahoma Press, (1970) at page 307:

> "It published annual reports, and its members testified before congressional committees and

> made speeches throughout the United States. These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the condition and sentiments of the Indians and in a high moral tone urged the abolition of their institutions as a deliverance to them. Greed, philanthropy, and public opinion were thus united to break down the tribes' defenses. What might have been advocated as a measure of cold-blooded realism was represented a holy crusade."

Respondent agrees that the courts look to legislative history to ascertain congressional intent to disestablish a reservation, but it must be remembered that the Dawes reports, to which petitioner refers, are not congressional committee reports. They are simply reports of a commission established to further the assimilationist policies of the times by persuading the tribes to allot their lands in severalty and thereafter implement the allotment process. More importantly it should not go unnoticed that petitioner is unable to cite a single congressional act in which the Congress explicitly disestablished the Potawatomies reservation boundaries. This Court in *Solem v. Batlett*, 465 U.S. 463, 470 (1984) reiterated the rule that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise". (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909) simply allotting the lands out in individual plots within the area does not change it's reservation character.

A study of the legislation resulting in allotment of the Potowatomi lands finds no expression on the part of Congress to disestablish the tribe's reservation. The tribe

continues today, to own and occupy surplus lands that were not sold. There is no doubt that the sales of surplus land was not for the purpose of facilitating non-Indian settlement on the reservation but that does not manifest congressional intent to disestablish it. The dealings with the Potawatomies were akin to the situation in *Mattz v. Arnett*, 412 U.S. 481 (1973) where the Court held that an Act opening lands for settlement, allotting lands to tribal members and sale of the surplus for an undisclosed sum to be deposited for the tribes benefit did not evidence an intent to terminate the reservation status of the entire area. It cannot be denied that members of Congress at the time of the allotment process probably thought that this would eventually terminate tribal existence. But, as this Court said in *Solem* at 468, "the Congresses that passed the Surplus Land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process. We have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations . . . "

A few years later the country began to take a dim view of these former termination and assimilationist policies. The advent of a new policy, came with the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §501 et seq. The OIWA stopped the allotment of Oklahoma's Indian lands and allowed the tribes to reorganize their shambled governments. Whatever the Congress might have done earlier the notion of Oklahoma being an "Assimilated state" was laid to rest in 1936.

B. Tribal Trust Land In Oklahoma Is "Indian Country" Over Which The State Does Not Generally Have Jurisdiction

This Court does not have to decide whether the original Potawatomi reservation in Oklahoma has been disestablished or whether its boundaries have been abolished. Whether conduct of Indians has occurred on "Indian country" has increasingly become the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *California v. Cabazon Band Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 421, 427-428 & N.2 (1971) *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert. Den. sub nom *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, Handbook of Federal Indian Law 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. §1511(a)(1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate Bill 555, Indian Gaming Regulatory Act, 25 U.S.C. §2701 et

seq. Section 2703(4)(b) of the Act defines "Indian lands" for tribal and federal jurisdictional purposes as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power.

This Court has designated lands as "Indian country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to Indian occupancy . . . validly set apart for the use of Indians." This includes lands held in trust for a tribe by the United States. *John* at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 822-823 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, *May*, supra at 82.

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country*

despite disestablishment. (emphasis supplied) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085.

The terms "reservation" and "Indian country" are used interchangeably by the Congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands". Cohen's Handbook of Federal Indian Law (R. Strickland Ed. 1982) at 35 n.66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country', a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1163 (Okl. Cr. 1983).

Here, the property on which the respondent conducts its business was conveyed by the Pottawatomies to and accepted by the United States in trust. (JA 16) This was done for reasons that should be obvious. It was the intent of both the Tribe and the United States that this tract of land would be removed from the jurisdiction of the State of Oklahoma. The Petitioner has had much difficulty in accepting this but as the Court said in *Oneida*, at 678:

> "There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians."

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), on which petitioner contends is controlling, when coupled with the obiter dicta found in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), should not be applied here for several reasons. First, sovereign immunity from suit was not at issue in either case. Secondly, the leased lands involved in *Mescalero* were located outside tribe's recognized reservation. The Tribe's convenience store in this case is located within the exterior boundaries of its original reservation, and the territorial boundaries for its present day government which have been approved by the Department of the Interior. Third, New Mexico's Enabling Act makes a distinction between on and off reservation activities for taxing Indian tribes. *Mescalero* at 149-150. Oklahoma's Enabling Act has no such provision. Congress expressly granted New Mexico more powers over Indians than it did Oklahoma. Oklahoma's authority is restricted to the power given it by federal common law. The issue there was whether the area was on or off a "reservation" not "Indian country". The term "reservation" was used in a different context in New Mexico's enabling legislation than it is used today. Finally, as will hereinafter be more fully discussed, whether the Potowatomies are immune from suit does not depend, in any event, on whether they are engaged in activities on trust lands, Indian country or a reservation. Suit immunity is an attribute of sovereignty not dependent on geography.

II. THE CIRCUIT COURT'S DECISION BARRING THE TAX COMMISSION'S COUNTERCLAIM WAS SUPPORTED BY LONG ESTABLISHED PRECEDENT AND PUBLIC POLICY WHICH SHOULD NOT BE DISTURBED

A. Tribal Sovereign Immunity From Suit Is Deeply Rooted In American Jurisprudence

That this Court has been unwavering in its long-standing rule requiring an unequivocal waiver of sovereign immunity from suit by Congress before any court can be said to have jurisdiction over an Indian tribe is incapable of challenge. *Turner v. United States*, 248 U.S. 354 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Puyallup Tribe v. Dept. of Game of the State of Washington*, 433 U.S. 165 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). The rule applies with equal force where the tribe initiates the litigation and a counterclaim is asserted. *United States Fidelity & Guaranty* at 513. In *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985) California's petition for certiorari's four "questions presented" included an objection to the lower courts' barring its counterclaim for taxes on the grounds that there was not effective waiver of the tribe's sovereign immunity from unconsented suit. Noticeably determining that the issue of sovereign immunity from suit was settled, this Court granted the petition on three questions but declined to do so on the suit immunity question. (See Petition for Certiorari, No. 85-130)

Here, the Tax Commission brazenly says to the Court that "the correct approach is to strike down tribe's

immunity defense". (Pet.Br. at p.29) and on the next page it claims it "recognizes the tribe's right to govern itself . . . ". There can be no credible attempt at reconciling these two statements. If the states are permitted to apply their laws to Indian tribes on Indian country and coercively enforce them in the courts the tribes would govern nothing and would be governed by the states. Indian tribes would be reduced to nothing more than social clubs.

In its zeal for complete and total dominance over Indian tribes in Oklahoma, the state unabashedly asks this Court to not only contradict its own well reasoned pronouncements in the decisions heretofore cited but to act in an area the Court has conceded, time and time again, it has absolutely no authority whatsoever. The Court has said "It is for congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of congress." *Celestine*, supra, 215 U.S. at 290. Regarding tribal sovereignty the Court has declared "Until congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Referencing the Choctaw and Chickasaw Nations the Court in *United States Fidelity & Guaranty* at 512 said "These Indian Nations are exempt from suit without congressional authorization." If any embellishment regarding this categorical proposition were necessary, the Court provided it in its interpretation of the holding of *United States Fidelity & Guaranty*: "We held [there] that the earlier judgment was void in the absence of congressional authorization for a suit . . . " *Puyallup*, 433 U.S. at 172 N.10. In *Three Affiliated Tribes* the Court expressly taking

cognizance of "congress' jealous regard for Indian self-governance," 476 U.S. at 890, and concluded that "[t]he common law sovereign immunity possessed by the tribe is a necessary corollary to Indian sovereignty and self-governance." On this basis, it then reaffirmed – if further reaffirmation were needed that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." Id. at 891.

This Court has also previously addressed the Tax Commission's overstated concerns of state financial ruin at the hands of Indian tribes in *Creek County v. Seber*, 318 U.S. 705, 718 (1943). There, in reference to certain Indian tax exemptions the Court said "the fact that the acts . . . may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of congress."

Moreover, should this Court adopt the tax commission's position and "strike down" tribal immunity from suit much confusion between the legislature and judicial branches would ensue. This Court has not only concede the Congress' unqualified authority in the field of Indian sovereignty but the Congress has demonstrated that it likewise believes it to be one of its perogatives. Although it has not done so often, the Congress has not only shown that it knows how to abrogate tribal immunities when it is disposed to do so but, in the exercise of its trust responsibility, does so with great selectivity and care. See e.g. Act of June 28, 1898 §2, 30 Stat. 495 (held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); Act of April 26, 1906 §18, 34 Stat. 137, 144, (held to be *limited* abrogation of

immunity in *United States Fidelity & Guaranty*, supra at 513; allowing certain counterclaims to be asserted against tribes in Oklahoma federal courts); Public Law 93-195, 87 Stat. 769 (1923) (limited waiver of immunity to allow Choctaw, Cherokee and Chickasaw tribes to sue each other over the Arkansas Riverbed); Indian Civil Rights Act of 1968, 25 U.S.C. §1301-1303 (limited grant of jurisdiction only allowing habeas corpus relief). And, it has clearly warned when it did not intend for its legislation to be misapplied to confer jurisdiction over Indian tribes. Indian Self-Determination Act, 25 U.S.C. §450(N) providing "nothing in this Act shall be construed as affecting, modifying, diminishing, or otherwise impairing the immunity from suit enjoyed by an Indian tribe."; H.R. 13329, 95th Cong. 2nd Sess. (1978) (Proposal for wholesale diminution of tribal sovereignty rejected by Congress). Moreover, only this past year, Congress remained under the preception that it exercised complete dominion over tribal immunities. See, e.g. SB 517, 101st Cong., 1st Sess. (1989), introduced by Senator Orin Hatch, which would waive sovereign immunity as to any claim under the Indian Civil Rights Act.

B. Sovereign Immunity Is Essential To Tribal Automony, Self-Governance And The Federal Trust Relationship

The Trust Relationship between the federal government and Indian tribes was first recognized by this Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) where Chief Justice Marshall described the tribes as being "in a state of pupilege; their relation to the United States resembles that of a ward to his guardian. They look to our

government for protection; rely upon its kindness and its power; . . . " In *United States v. Kagama*, 118 U.S. 375 (1886) the Court addressing Congress' authority to impose the major crimes act on Indian Country said:

> "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent largely for their political rights. They owe no allegiance to the states, and received from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises a duty of protection, *and with it the power*. This has always been recognized by the executive and by congress, and by this Court, whenever the question has arisen." (emphasis supplied).

Later, in *United States v. Sandoval*, 231 U.S. 28, 46 (1913) the Court, after a "careful review" of prior decisions, stated:

> "Taking these decisions together, it may be taken as the settled doctrine of this Court that Congress, in pursuance of the long established policy of the government, *has the right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body and not the Court*, to determine when the true interest of the Indian require his release from [the guardianship]". (emphasis added)

The trust responsibility and relat' nship with the federal government "is one of the primary cornerstones of Indian Law". F. Cohen, Handbook of Federal Indian Law, 220-221 (1982 Ed.)

The Court in *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981), speaking through Judge Anthony Kennedy, said:

> "Indian tribes enjoy immunity because they are sovereign predating the constitution, immunity is thought necessary to perserve autonomous tribal existence." (emphasis supplied)

In exercise of its trust responsibility the federal government has vigorously promoted tribal self-governance, automony and self-determination. This policy, pursued under the federal government's plenary authority over tribal affairs, could easily be frustrated if the tribes were made subject to state laws and the jurisdiction of state or federal courts to coercively enforce them. Further, it this Court should "strike down" tribal immunity limited tribal resources would soon be diminished. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895).

C. Tribal Immunity From Suit Is Not Dependent Upon Geographical Considerations

The tax commission has devoted a substantial portion of its brief in pursuit of its odd theory that no Indian country exists in Oklahoma, that by reason thereof no tribal immunities prevail and that state government and the courts are free to assert jurisdiction over tribal governments, the absence of Congressional or tribal consent notwithstanding. Amicus submits that such argument is immaterial. This Court has never said that tribal immunity from unconsented suit is dependent upon where the cause of action arose. See e.g. *Puyallup*, supra, at 173 where the Court vacated the state court's restraining

order entirely as it applied to the Tribe's conduct both on and off its reservation.

The courts of Arizona, which as a large Indian population with tribes who are very active in both proprietary and governmental functions both off and on their reservation routinely hold that immunity is not governed by geographical considerations. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-424 (Ariz. 1968); *S. Unique v. Gila River Pim-Maricopa*, 674 P.2d 1376, 1379 (Ariz. App. 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 507 (Ariz. App. 1985); *Dixon v. Picopa Const. Co.*, 755 P.2d 421 (Ariz. App. 1987).

D. Determination Of The Continued Viability Of Tribal Sovereign Immunity From Suit Is For The Congress And Is Therefore A Non-Justiciable Political Question

While this Court has seldom rejected the justiciability of an issue on political question grounds and, in fact, has routinely upheld tribal suit immunity on the merits (see supra at 17) amicus nevertheless suggests that it is an issue for which such determination is appropriate.

To be a proper subject for adjudication by a court, a controversy must also be justiciable – that is, appropriate for judicial inquiry or adjudgment. A controversy is not justiciable if it exclusively or predominately involves political questions the determination of which is a perogative of the legislative or the executive branch of the government. In *Baker v. Carr*, 369 U.S. 186, 211 (1962) the court reviewed its past precedents in order "to infer from them the analytical threads which make up the political

question doctrine." The Court said "[p]rominate on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government." Id. at 217. One of the threads it exhausted concerned "[t]he status of Indian tribes." Id. at 215.

In *Atkinson v. Haldane*, 569 P.2d 151, 162 (Alaska 1977) the Alaskan Supreme Court in a decision that is a model for scholarliness reaffirmed tribal immunity and found "merit in petitioner's further argument that *what is at issue here is essentially a political question* and this Court should adhere to the principle that political questions are not justiciable." (emphasis supplied).

The tax commission is asking this Court to take hold of this issue and "strike down" tribal immunity when the Court's authority to act simply cannot be reconciled with it unwaivering pronoucements that the power to do so is in the plenary power of Congress. Supra at 18. These decisions do not qualify Congressional authority on whether tribal members live on reservations, or have or have not been assimilated into the dominate society or are engaged in a propriatary as opposed to governmental function, or as subject to an infringement preemption balancing test. This court and legions hundreds of others have simply said such authority of the Congress is plenary.[4] What the tax commission seeks is to short-circuit the

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[4] The Oklahoma Supreme Court has defined the term "plenary" to mean "full, entire, complete absolute, perfect and

(Continued on following page)

system by attempting to get this Court to do what Congress has thus far declined to do. Moreover, it does so without even having attempted to have Congress act. If the tax commission wants tribal immunities abolished as the "correct approach" (Pet. Br. at p.29) to its dilemma then it should lobby the Congress as others are required to do when a problem requires their attention.

E. The Tax Commission's Argument Below That Its Counterclaim Is Mandated By Rule 13(a), Federal Rules Of Civil Procedure, And Proper Under The Doctrine Of Recoupment Is Unpersuasive And Incorrect.

Petitioner argued below that its counterclaim was proper under Rule 13(a), Federal Rules of Civil Procedure and the doctrine of recoupment. Even though petitioner has apparently abandoned these theories since it makes no mention of them in its brief, amicus believes it should address these claims.

The court in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 757 F.2d 1047, 1053 (1985), found that Rule 13(a) does not rise to the level of a Congressional waiver of tribal sovereign immunity:

> "[T]he compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a congressional waiver of the Tribe's immunity . . . Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately . . . nor can we read Rule 13(a) in

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(Continued from previous page)

unqualified." *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okl. 1942).

> isolation and extend federal jurisdiction despite the repeated specification that the rules are not intended to have such an effect."

This Court has held that recoupment against a sovereign is a defense to all or a part of the sovereign's suit but does not give a defendant any right to affirmative relief. *United States v. Shaw*, 309 U.S. 502, 504 (1940). The respondent did not ask for damages or declaratory relief in its action injunction. Yet, the trial court granted the tax commission affirmative relief in the form of a declaratory judgment. The circuit court correctly reversed.

III. THE TAX COMMISSION'S ATTEMPT TO ASSESS ITS SALES TAXES AGAINST THE TRIBE IS UNAUTHORIZED AND WAS PROPERLY ENJOINED

Petitioner relies on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) to pursue its claim assessing the tribe for an alleged $2,691,470.00 tax liability.[5] (Pet. Br. at p.3) Neither of these decisions authorize application of uncollected taxes to the tribe which is the relief sought by petitioner. It readily admits that if this Court should decide "the holding *United States Fidelity & Guaranty* must be abandoned . . . *the tribe* will be exposed to millions of dollars of delinquent tax liability." (emphasis added)

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[5] Amicus believes that this figure is preposturously exaggerated. It is doubtful the total gross sales receipts from cigarettes are more than a fraction of this amount much less the sales having taxes of that sum.

The taxes sought to be collected from the tribe clearly arises out of activities engaged in on Indian country over which Oklahoma has no jurisdiction. The prohibiting enforcement of these taxes is settled. In *Mescalero Apache*, supra, this Court said:

> " . . . in the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation and *McClanahan v. Arizona State Tax Comm'n*, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." 411 U.S. at 148.

This Court has adopted a "per se rule" – in the special area of state taxation of Indian tribes and tribal members. *California v. Cabazon Band of Indians*, 480 U.S. ___, 94 L.Ed.2d 244, 258 F/N 17. The exemption of Indian tribes" from state taxes is lifted only when Congress had made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

The tax commission has been unable, indeed not even attempted, to cite a single Congressional act which would condone its attempted assessment. The injunction should stand.

CONCLUSION

The land over which the tax commission seeks to assert its authority is clearly "Indian country" as defined by this Court and the Congress. It is well established that state laws do not apply to activities on such land. Further, it is fundamental that the state may not tax an Indian tribe directly as the Oklahoma Tax Commission attempts to do here and it has offered no persuasive or valid authority to do so. Its request that this Court ignore the perogatives of the Congress in determination of when Indian tribes will be taxed by the states and subjected to unconsented jurisdiction of the courts is incredible and defies long settled principles enunciated by this Court. Having made no effort to seek relief in the proper forum, the United States Congress, the tax commission attempts to circumvent the system by asking this Court to do what it has repeatedly acknowledged was beyond its constitutional authority. Its request should be rejected and the circuit court's decision affirmed.

Respectfully submitted,

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No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE ALABAMA-COUSHATTA INDIAN TRIBE OF TEXAS, THE UNITED INDIAN NATIONS OF OKLAHOMA, (additional amici listed inside) IN SUPPORT OF RESPONDENT

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Menominee Indian Tribe of Wisconsin;
Miccosukee Tribe of Indians of Florida;
Mille Lacs Band of Chippewa Indians;
Native Village of Tyonek;
Oglala Sioux Tribe of the Pine Ridge Reservation;
Poarch Band of Creek Indians;
St. Regis Band of Mohawk Indians of New York;
Seminole Tribe of Florida;
Sisseton-Wahpeton Sioux Tribe;
Three Affiliated Tribes of the Fort Berthold Reservation;
Walker River Paiute Tribe;
Association on American Indian Affairs

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INTEREST OF THE AMICI CURIAE

Amici curiae are seventeen (17) federally-recognized Indian tribes, one regional tribal organization, and one national Indian-interest organization.[1] Ami have a substantial interest in the issues raised in this case. The issues involve the scope of the doctrine of tribal sovereign immunity from suit as that doctrine is expressed in federal law, and the geographic territory over which that doctrine and other principles of federal Indian law apply.

The United Indian Nations of Oklahoma was formed in the 1980's to help support and advance Indian tribes on issues of concern to the health and welfare of Indian people in the region of the State of Oklahoma. Its membership consists of twenty-nine (29) federally-recognized Indian tribes.[2] The Association on American Indian Affairs is a non-profit organization dedicated to protecting the rights and improving the welfare of American Indian and Alaska Native communities nationwide. It

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[1] Counsel for Petitioners and counsel for Respondents have consented to the filing of the brief of amici in support of Respondents. The consents are submitted for filing herewith.

[2] They are, the Absentee-Shawnee Tribe; Alabama-Coushatta Tribe of Texas; the Apache Tribe; the Caddo Tribe; the Cheyenne-Arapaho Tribe; the Cherokee Nation; the Chickasaw Nation; the Choctaw Nation; the Comanche Tribe; the Muscogee (Creek) Nation; the Eastern Delaware Tribe; the Fort Sill Apache Tribe; the Iowa Tribe of Oklahoma; the Kaw Tribe; the Kickapoo Tribe of Kansas; the Kickapoo Tribe of Oklahoma; the Kickapoo Tribe of Texas; the Kiowa Tribe; the Otoe-Missouria Tribe; the Pawnee Tribe; the Ponca Tribe; the Sac and Fox Tribe; the Seminole Nation; the Seneca-Cayuga Tribe; the Thlopthlocco Creek Tribe; the Tonkawa Tribe; the Western Delaware Tribe; the Wichita Tribe; and the Wyandotte Tribe.

was founded in 1922 and is the largest Indian-interest organization in the country, with a membership of about 14,400 individuals, Indian and non-Indian.

Amici urge this Court to affirm its prior holdings that the sovereignty of Indian tribes includes the right to be immune from suit without their consent or the consent of Congress, and that such sovereignty is properly exercised within the bounds of tribal trust lands such as are involved here. Amici tribes currently exercise their sovereign authority over their trust lands and other Indian country within their jurisdiction. They do so under this Court's prior holdings and under other federal law confirming their sovereignty and sovereign immunity.

Immunity from suit is especially important to amici in cases such as this, which pose a grave danger to tribal public treasuries. Indeed, a fundamental purpose of the doctrine of sovereign immunity is to protect against raids on public treasuries. Diminishment of their treasuries would hinder the ability of tribes to provide essential governmental services and engage in economic development, and thereby undermine the congressional goal of tribal self-government and economic self-sufficiency. Thus, tribal achievement of this congressionally expressed goal hinges on continued protection of their sovereignty by this Court.

SUMMARY OF ARGUMENT

Absent consent, a state cannot sue an Indian tribe to recover back taxes, penalties, and interest. Federal law confirms the sovereign immunity of tribes from

unconsented suits. This Court has steadfastly held that in the absence of congressional consent it cannot abrogate that immunity and the State here points to no evidence of congressional consent to its suit. The Court's continued protection of tribal sovereign immunity is particularly warranted where a raid on a tribal treasury is threatened, such as here. Such raids on public treasuries are contrary to general principles of sovereign immunity in American jurisprudence and would clearly frustrate important federal interests in assisting Indian tribes in achieving governmental and economic self-sufficiency.

Remedies exist by which the State may enforce its applicable tax laws prospectively, such as seizing unstamped cigarettes off the reservation, or assessing the wholesaler rather than the tribal retailer. The State here chose not to fully pursue these remedies. Instead, after allowing its taxes to go uncollected over a period of many years, and without pointing to any law or compelling reason, it asks this Court to overturn scores of precedent and facilitate raids on tribal treasuries by generally abrogating tribal sovereign immunity. This Court should decline that invitation and refer the State to Congress, the branch of the federal government properly charged with consenting to suits against sovereign Indian tribes.

The State also seeks to avoid the application of the federal doctrine of tribal sovereign immunity and other principles of Indian law by arguing that the reservation boundaries in this case have been disestablished; that the tribal land involved here is not subject to tribal jurisdiction; and that Indian tribes in Oklahoma and their lands are somehow different and therefore exempt from the normal rules of Indian law.

These arguments are meritless in light of established legal principles. Cases of this Court firmly establish that questions of boundary disestablishment are irrelevant to issues of jurisdiction over trust land such as are involved in this case. Other cases and congressional enactments confirm that land validly set aside for tribal use and subject to federal protection is subject to tribal jurisdiction; which is precisely the status of the land here. Finally, this Court and Congress have consistently treated Indian tribes in Oklahoma the same as tribes elsewhere, and the Court should continue to do so in this case.

ARGUMENT

I. THE STATE IS BARRED BY FEDERAL LAW AND POLICY FROM SUING THE TRIBE FOR BACK TAXES OWED BY NON-MEMBER TAXPAYERS, PLUS INTEREST AND PENALTIES.

In Part I of this brief, amici will address the issue of whether the Oklahoma Tax Commission ("the State") may raid the public treasury of the Citizen Band Potawatomi Indian Tribe of Oklahoma ("the Tribe") to collect back taxes, penalties, and interest, and will show why federal law and policy prohibit that action. Amici will also address the issue of the State's existing remedies regarding applicable future taxes, and will show why those remedies are adequate and are all that this Court can provide as a matter of law.[3]

[3] Amici have chosen not to address the issue of whether the state taxes in this case are wholly invalid as applied to the Tribe's sales under the "legal incidence" test set forth by this

(Continued on following page)

A. Permitting The State To Sue The Tribe For Back Taxes, Penalties, And Interest Would Frustrate Federal Law And Policy Protecting Tribal Self-Government And Would Contradict Longstanding Principles Underlying The Federal Doctrine Of Tribal Sovereign Immunity.

In reliance on Moe, Colville, and Chemehuevi, the State has assessed the Tribe for almost $2.7 million dollars due to state taxes which the Tribe allegedly failed to collect over a period of almost four years.[4] The taxes, penalties, and interest that the State seeks must come directly from the Tribe's treasury. As an intrusion on core tribal interests in self-government and economic self-sufficiency, such assessment is impermissible under federal law.

(Continued from previous page)

Court in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) ("Moe"); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) ("Colville"); and California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) ("Chemehuevi").

The Court in these cases apparently holds that involuntary tribal assistance in collecting the state taxes does not violate federal law or interfere with tribal self-government. *E.g.*, Moe, 425 U.S. at 483. This is tantamount to a grant of authority to states to regulate Indian tribes, albeit subject to a "minimal burden" test. Amici respectfully submit that this result is erroneous, since directly subjecting tribes to state laws and in effect making them collection agents for the states does infringe on tribal self-government. We will not, however, address this issue in this brief.

[4] The taxes themselves are less than one third of the total amount the State seeks. Penalties, and interest, which of course accrues over time, make up the rest of the amount.

Notwithstanding the State's suggestions to the contrary, Indian tribes are sovereign governments.[5] Tribal sovereignty is recognized in and confirmed by federal law.

> The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. . . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . They are a good deal more than private, voluntary organizations. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (citations omitted).

Sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). Accordingly, as sovereign governments, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("*Martinez*"). This Court has recognized that Congress can waive tribal sovereign immunity, but the Court itself cannot judicially abrogate

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[5] The State suggests that Indian tribes in Oklahoma are somehow "different" than Indian tribes elsewhere. In Part II of this brief, amici will discuss how this Court and Congress historically have treated Oklahoma tribes the same as tribes elsewhere, and how that view continues to guide Congress.

it. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit." *Martinez*, 436 U.S. at 58, *citing United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) and *Turner v. United States*, 248 U.S. 354 (1919).

Thus, the Court historically has refused to allow unconsented suits against Indian tribes. In *United States v. United States Fidelity & Guaranty Co.*, the Court disallowed a judgment obtained in state court against two tribes for royalties allegedly due under coal land leases.

> We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. . . . These Indian Nations are exempt from suit without congressional authorization.

United States v. United States Fidelity & Guaranty Co., 309 U.S. at 512. Finding no congressional authorization, the Court concluded that "without legislative action the doctrine of immunity should prevail." *Id.* at 515.

One of the fundamental purposes of sovereign immunity in American jurisprudence is to protect against unconsented suits for retrospective relief in the form of money damages payable from the public treasury. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (suit prohibited under Eleventh Amendment immunity); *O'Neill v. State Highway Dep't*, 50 N.J. 307, 235 A.2d 1 (1967) (suit prohibited under common law immunity). Such relief is prohibited because it would deplete the public treasury as a means of compensating for past wrongs, it would mean a "monetary loss resulting from a past breach of a legal

duty." *Edelman v. Jordan*, 415 U.S. at 668. To the extent the State here seeks penalties and interest, that is doubly offensive to the principles of sovereign immunity. *Cf. Missouri Pac. R.R. v. Ault*, 256 U.S. 554 (1921); *United States v. New York Rayon Importing Co.*, 329 U.S. 654 (1947).

There has been no consent to suit against the Tribe in this case. Absent consent, there is nothing left for this Court to do but bar the State's claimed relief under *United States v. United States Fidelity & Guaranty Co., supra*. Significantly, the State points to no congressional authorization for its requested relief. Indeed, it cannot. Federal law and policy overwhelmingly suggest that an unconsented suit, particularly one which would raid a tribal treasury, is contrary to federal interests. "[A] principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) (1988). Considerable federal legislation has been enacted to encourage Indian tribes to develop their resources and economies and thereby strengthen their governments. *See, e.g.*, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721, the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1544; and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*"Cabazon"*), this Court noted that the federal policy of Indian self-government includes the overriding goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216. The Court held that "[t]hese are important federal interests. They were reaffirmed by the President's 1983 Statement

on Indian Policy." *Id.* at 217. The President declared that "[i]t is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 19 Weekly Comp. Pres. Doc. 99 (1983), *cited in Cabazon*, 480 U.S. at 217 n.20.

It is well-documented that Indian tribes are economically poor. In 1974, Congress noted that "[a]ll the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today there is almost a total lack of an economic community." H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2873, 2874. Unlike states, most tribes cannot rely on taxation as a source of raising revenue, in part due to historical federal policies of allotment and cession which have drastically reduced their land base. Taxation and economic development are especially difficult for reservations that "contain no natural resources which can be exploited." *Cabazon*, 480 U.S. at 218.

Plainly, forcing tribes to expend their typically meager public monies for back taxes, penalties, and interest would hinder or cripple their ability to engage in economic development. It would also cut into or eliminate tribal governmental operations and essential services such as law enforcement, court systems, and social programs; services that, in light of reductions in the federal budget, tribes increasingly must themselves fund. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219.

This Court should decline the invitation of the State to judicially abrogate tribal sovereign immunity and should hold that principles of tribal sovereignty as confirmed and recognized in federal law prohibit the State from collecting back taxes, penalties, and interest from an Indian tribe. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 1521 (1989) (tribal sovereign immunity is governed by federal law); and *see generally* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) ("the federal policies of tribal self-determination, economic development, and cultural autonomy require that the tribal immunity doctrine be maintained"). Immunity from suit is one of the highest attributes of sovereignty. The state and federal governments have spent tens of decades gradually shaping their laws regarding sovereign immunity, *e.g.*, tort claims acts, caps on liability, statutes of limitations. Tribal laws should be allowed to evolve in the same way.

Indeed, this Court ought to afford tribes more protection in the area of sovereign immunity than it does states. States do not share the tenuous economic status of tribes. Moreover, states have representatives in Congress and tribes do not. With direct representation, states can protect themselves in ways that tribes cannot. Indeed, when Congress has seen fit to step in and regulate economic activities on Indian reservations in which both tribes and states have an interest, it has done so. *See* the Indian Gaming Regulatory Act of 1988, *supra*. The State's suggestion that the Court engage in such policy-making should be rejected.

B. Regarding Future Taxes, Assuming *Arguendo* Such Taxes Are Valid, The State Has Remedies For Prospective Relief If Tribes Should Fail To Collect Them.

If an Indian tribe is not assisting in collecting applicable state taxes on cigarette sales, a state has at least two means to address the problem prospectively. It may seize unstamped cigarettes off the reservation, or it may assess the wholesaler for the taxes.[6] The State here did not even attempt the first remedy and it made an apparent feeble attempt at the second. For the most part, it chose to sleep on its rights for several years. Now, without any legal authority and with unclean hands, the State asks this Court to fashion a new drastic remedy by judicially abrogating tribal sovereign immunity generally so that it may raid a tribal treasury for back taxes, penalties, and interest that accumulated during the time it inexplicably did largely nothing. Not only is this drastic remedy contrary to law, it is wholly unwarranted in light of existing remedies available to the State.

To enforce their tax laws, states may seize unstamped cigarettes off the reservation. This remedy was approved in *Colville*, where the Court found the state's interests sufficient to justify such seizures and that the seizures did not intrude on "core tribal interests." *Colville*, 447 U.S. at 161-62. Nothing in the record here suggests the State tried to seize cigarettes off the reservation. Nor has the State

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[6] Whether there is a third remedy in the form of a suit against tribal officials for prospective injunctive relief is an issue about which amici express no opinion, but do note that such recourse was not even attempted by the State.

shown that its assessment of the Tribe directly does not intrude on tribal interests. Clearly the State has ignored both the holding and the reasoning of *Colville* on this point.

The State could also, as the United States suggests, assess the wholesaler for the taxes, rather than the tribal retailer. Brief for the United States as Amicus Curiae at 18 n.17, *citing* Okla. Stat. Ann. 68, §§ 305(a) and (c). As the United States notes, the State is aware of this remedy because in the past it has assessed a wholesaler who supplied some cigarettes to this Tribe. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 75 (1990).

The State hardly even tried to use its existing remedies. And it has failed to put forth any basis in law or reason why it is entitled to have this Court fashion a new remedy in this case. If existing remedies are insufficient, the State's answer lies with Congress. Congress can and has acted to waive tribal sovereign immunity when it sees fit to do so. *E.g.*, the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6903(13)(A), 6903(15), & 6972(a)(1)(A). *See also* the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(d)(7)(A)(ii) (federal district courts have jurisdiction over suits by tribes or states to enjoin class III gaming activity located on Indian lands and conducted in violation of tribal-state compact).

When Congress decides that tribal immunity from suit should bow to overriding federal policy, Congress knows how to waive such immunity. *See, e.g., Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (holding federal agencies and tribe liable under

RCRA to clean up solid waste disposal sites on reservation). There is, however, no congressional waiver of tribal immunity in the area of state taxes or for suits by states against tribes generally, and absent such a congressional statement, this Court has expressly held that it cannot imply one. *United States v. United States Fidelity & Guaranty Co., supra.*

II. THE STATE'S ARGUMENTS ABOUT THE CONTINUED EXISTENCE OF THE ORIGINAL BOUNDARIES OF THE RESERVATION ARE IRRELEVANT TO THIS CASE INVOLVING LAND HELD IN TRUST FOR THE TRIBE; MOREOVER, CONTRARY TO THE STATE'S CONTENTIONS, SUCH LAND IS SUBJECT TO TRIBAL JURISDICTION.

In Part II of this brief, amici will address the State's argument that the reservation boundaries have been disestablished, and will show why that argument is irrelevant as a matter of law to the issue raised in this case, that of jurisdiction over activities on tribal trust land. Amici will also address the issue of whether the tribal land involved in this case is subject to federal and tribal jurisdiction for the purposes of determining the issues presented herein, and will show that indeed the land is so subject to federal and tribal jurisdiction.

A. Under *Solem v. Bartlett* And Other Cases Of This Court, Disestablishment Is Irrelevant To Issues Of Jurisdiction Over Trust Land.

The State argues or implies that the boundaries of the Tribe's reservation have been disestablished. State's

Opening Brief at 10-11. Cases of this Court, however, hold that the issue of whether the boundaries of a reservation have been disestablished is relevant only to issues of jurisdiction over non-Indian fee land. Hence, the disestablishment issue is plainly irrelevant to this case which raises only issues of jurisdiction over activities on tribal trust land.

In *Solem v. Bartlett*, 465 U.S. 463 (1984) ("*Solem*"), the Court determined whether the boundaries of a reservation had been disestablished. But the reason that issue was pertinent was because the underlying issue was whether the state had jurisdiction over a portion of a reservation which had been opened to settlement by non-Indians by an act of Congress. Framing the narrow issue before it up front, the Court noted the distinction between the effect of reservation boundary disestablishment on non-Indian fee land and its effect on trust land.

> Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress fall within the exclusive criminal jurisdiction of federal and tribal courts.

Solem, 465 U.S. at 467 n.8 (citations omitted); *accord DeCoteau v. District County Court*, 420 U.S. 425, 427-28 (1975) ("*DeCoteau*").

Solem and *DeCoteau* plainly establish that issues of the existence of reservation boundaries are relevant only to issues of jurisdiction over activities on non-Indian fee lands, and are irrelevant to issues of jurisdiction over

trust lands, allotted and tribal. This rule has been repeatedly and unequivocally followed by the Tenth Circuit Court of Appeals and the Supreme Court of Oklahoma with respect to trust lands in Oklahoma. *See Indian Country, U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 975 n.3 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) (disestablishment question is relevant only to issues of jurisdiction over non-Indian lands; not tribal lands, trust lands, and allotments); *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (issue of reservation boundary disestablishment irrelevant to jurisdiction over tribal trust lands and trust allotments); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 82 (Okla. 1985) (trust allotments of tribe remain Indian country irrespective of reservation boundaries); *Ahboah v. Hous. Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (individual trust allotments are Indian country, whether within or without continuing reservation boundaries); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3327 (U.S. Oct. 18, 1990) (No. 90-635) (allotted lands retain Indian country status for territorial jurisdiction purposes even if reservation boundaries have been disestablished).[7]

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[7] While many of these cases involved only trust allotments, that is simply because allotments happened to be the facts in those cases. As the United States points out, it would be perverse for the Court to find that a tribe had jurisdiction over land held in trust for its members, but did not have jurisdiction over land held for the tribe. Brief for the United States as Amicus Curiae at 26 n.20. Clearly, there is no principled reason for distinguishing tribal trust land from trust allotments in this situation.

This case raises only issues of jurisdiction over activities on tribal trust land. Hence, the question of the existence of reservation boundaries is irrelevant. Indeed, the land here has never been opened to settlement by non-Indians. *Compare Solem, supra,* 465 U.S. at 465. It has always been held either by the Tribe or the federal government. *See* State's Opening Brief at 11. Accordingly, this Court should disregard the State's argument to the extent the State is claiming that its jurisdiction over activities on the trust land is dependent on the existence or disestablishment of the reservation boundaries.[8]

B. Under A Long Line Of Cases Preceding And Including *United States v. John,* The Tribal Trust Land In This Case Is Territory Subject To The Tribe's Jurisdiction.

The State also argues or assumes that, even if the reservation boundaries have not been disestablished, the

[8] Alternatively, should this Court find that the existence of the reservation boundaries is relevant to this case, it should remand to the district court for a determination of that existence under its test articulated in Solem, 465 U.S. at 470. In Solem, recognizing the magnitude and importance of a finding of disestablishment, the Court cautioned against generalized, conclusory findings of disestablishment. *Id.* at 468-69. Rather, a finding of disestablishment requires a particularized inquiry of applicable acts of Congress, the historical circumstances surrounding the passage of those acts, and the subsequent treatment of the land by the federal government. The State's sweeping argument that the boundaries of Indian reservations in Oklahoma generally have been disestablished is flatly inconsistent with Solem and prior rulings of this Court in disestablishment cases.

land in this case is not subject to tribal jurisdiction for the purposes of resolving the issues presented herein. State's Opening Brief at 21-27. The land, however, is subject to the Tribe's jurisdiction because it has been validly set aside by Congress for the Tribe's use, and is held in trust for the Tribe by the federal government. This conclusion is mandated by decisions of this Court involving similar lands and congressional intent as manifested in federal statutes.

This Court has long held that lands "declared by Congress to be held in trust by the Federal Government" for the benefit of a tribe are subject to federal and tribal jurisdiction. *United States v. John,* 437 U.S. 634 (1978). There, the Court stated:

> The . . . lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that time.

437 U.S. at 649 (citations omitted). Precisely the same kind of lands as were involved in *United States v. John* are involved in this case. The land here was set aside by Congress and is held in trust for the Tribe. Act of Jan. 2, 1975, 88 Stat. 1922. *See also Mattz v. Arnett,* 412 U.S. 481 (1973) (undisposed-of ceded land restored to tribal ownership by Congress); *United States v. McGowan,* 302 U.S. 535 (1938) (lands purchased out of federal funds and occupied by tribe); *United States v. Pelican,* 232 U.S. 442

(1914) (allotted lands); *United States v. Sandoval*, 231 U.S. 28 (1913) (lands of Pueblo tribes held in fee); *Donnelly v. United States*, 228 U.S. 243 (1913) (executive order tribal lands); *Bates v. Clark*, 95 U.S. 204 (1877) (lands in original Indian title); and *see generally* F. Cohen, *Handbook on Federal Indian Law* 27-41 (1982 ed.) (hereinafter "Cohen").

In the Indian Country statute, 18 U.S.C. § 1151, Congress essentially adopted the test long adhered to by this Court: lands that are validly set aside for the Indians' use and are subject to federal protection are subject to federal and tribal jurisdiction. Accordingly, while Section 1151 is found in the federal criminal code, this Court has stated that the definition applies "to questions of both criminal and civil jurisdiction." *Cabazon, supra*, 480 U.S. at 207 n.5; *accord DeCoteau, supra*, 420 U.S. at 427 n.2. This rule has been widely followed by lower federal courts and state courts. *E.g., Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n, supra*, 829 F.2d at 973 (numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands); *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988) (tribal taxing jurisdiction extends to Indian country as defined in 18 U.S.C. § 1151); *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, supra*, 711 P.2d at 82 (definition of Indian country is relevant to questions of both criminal and civil jurisdiction).[9]

[9] Indeed, it would be anomalous for this Court to find that tribes do not have civil jurisdiction over territory which they

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Under this law and these principles, the land involved in this case is subject to tribal jurisdiction for the purpose of resolving the issues raised herein. This Court should affirm the holding of the Court of Appeals affirming the district court in this case on this point. The land is indisputably tribal trust land. Indeed, the State does not even argue that the land is not Indian country as defined in section 1151. Its narrow view of land subject to tribal jurisdiction simply runs counter to the long-time view of Congress and this Court. *E.g., United States v. John, supra.*

Essentially, the State's argument about the land in this case hinges on its theory that Indian tribes in Oklahoma and their lands generally are somehow "different" than tribes and tribal territory elsewhere. The State's primary "authority" on this point is paper generated by the Dawes Commission in allotting Oklahoma Indian lands in the 1890's. It is true that reservations in Oklahoma were subject to the federal allotment policy of the late nineteenth century. But so were reservations elsewhere, and the policy of allotment has long since been repudiated by Congress. *Moe, supra*, 425 U.S. at 478-79. Furthermore, the State's attempt to rely upon the intermingling of Indians and non-Indians on reservations, which, as a practical matter resulted from the allotment

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obviously have criminal jurisdiction over under section 1151. Decisions of this Court such as Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and Duro v. Reina, ___ U.S. ___, 110 S.Ct. 2053 (1990) hold that tribal criminal jurisdiction is more limited than tribal civil jurisdiction. Under that theory, if tribes have territorial jurisdiction for criminal purposes, *a fortiori* they have it for civil purposes.

policy, as grounds for contending that the Tribe lost jurisdiction over its tribal trust lands was soundly rejected by this Court in *Moe, id.* at 476; *see also* Cohen, *supra*, at 231.

Indeed, this Court has historically treated tribes in Oklahoma the same as tribes elsewhere. Both *United States v. United States Fidelity & Guaranty Co., supra*, and *Turner v. United States, supra*, the cases in which this Court upheld tribal sovereign immunity, involved Oklahoma tribes. This Court recently applied normal rules of Indian law and other federal law doctrines to an Oklahoma tribe in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). Clearly, the dictum in the one case upon which the State relies, *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), is inapposite. That case involved the application of federal and state law to the personal property of Indian individuals, not the trust property of Indian tribes.

Moreover, the State's argument cannot withstand the voluminous evidence that the federal government today treats Oklahoma tribes and their territory the same as it treats tribes and their lands elsewhere. In virtually every area in which it administers its trust responsibilities, Congress affords Oklahoma tribes the same protection and services as it does other tribes. *See, e.g.*, 7 U.S.C. § 1985(e)(1)(D)(ii) (agricultural credit and loans); 25 U.S.C. § 2022b(b)(3) (educational grants and programs); 29 U.S.C. § 750(c) (handicapped vocational rehabilitation services); 42 U.S.C. § 682(i)(6) (job opportunities and basic skills training programs); 42 U.S.C. § 5318(n)(2) (urban development grants); *see also* citations to other similar statutes in the Brief for the United States as

Amicus Curiae in this case at 25-26 & n.19.[10] In fact, the federal government has publicly advocated its view that the Tribe here is entitled to the same governmental and territorial protection to which tribes elsewhere are entitled. *See* Brief for the United States as Amicus Curiae in this case.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed regarding its holdings that the Tribe is immune from suit, and that the trust land is subject to tribal jurisdiction.

Respectfully submitted,

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[10] The references in some of these statutes to "former Indian reservations in Oklahoma" is plainly intended to define the outer boundaries of federal service areas as coinciding with the original boundaries of the reservations, notwithstanding that some reservations may have been judicially determined to be diminished. Such references evince the continued significance of these boundaries for important federal purposes.

(13)

No. 89-1322

In The

Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE SAC AND FOX NATION, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, WICHITA CADDO AND DELAWARE INDUSTRIES, MUSCOGEE (CREEK) NATION, YANKTON SIOUX TRIBE, CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA AND THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Pursuant to Supreme Court Rule 37, the Sac and Fox Nation, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita Caddo and Delaware Industries, Muscogee (Creek) Nation, Yankton Sioux Tribe, Cheyenne and Arapaho Tribes of Oklahoma and the Absentee Shawnee Tribe of Oklahoma (hereinafter referred to as "The

Tribes"), file this brief *amicus curiae* on the side of respondent and in opposition to the petitioner in this case. Both respondent and the petitioner have consented to the filing of this brief of *amicus curiae*.

The Tribes are federally recognized Indian tribes with longstanding treaty relationships with the United States and are established, well organized tribal governments. Petitioner challenges the decision below by contending that Oklahoma, and thus the Tribes, have no Indian reservations. Such a ruling is argued to mean that the Tribes and their members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding by this Court in favor of petitioner on these grounds would have a devastating impact on the Tribes and their members, for it would deprive the Tribes of virtually all their traditionally exercised governmental authority.

The Tribes' governmental interests are vital. The Tribes submit the attached brief to show that the jurisdictional status of Indian owned restricted lands resides with the Tribal and Federal government. The Tribes also wish to address the history of decisions by this Court and the lower federal and state courts precluding state jurisdiction, and upholding federal and tribal jurisdiction, over Indian lands in Oklahoma, including allotments, reserved lands and subsequently acquired lands. Both Congressional policy, and the consistency of federal and state court decisions upholding federal jurisdiction and denying state authority serve as reason for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

INTEREST OF AMICUS CURIAE

The Tribes are important federally-recognized Indian tribes with a continuous treaty relationship with the United States, which began in the earliest years of the Republic, having well-organized tribal governments. The governmental authority of the Tribes would be seriously compromised if the Court were to rule favorably on the contentions presented by petitioner. Petitioner argues that the absence of a reservation equates to full state governmental authority over the Indian Country of the Tribe. The Tribes have a vital interest in protecting their governmental authority, and their corresponding exemption from state jurisdiction. This authority and exemption are established in prior decisions of this Court.

Some of the Tribes participating in this brief administer their own tribal court supported by Bureau of Indian Affairs grants and contracts, tribal tax revenues, and tribal funds. Other Tribes participating in this brief participate in the Court of Indian Offenses administered by the Anadarko Area Office or the Muscogee Area Office of the Bureau of Indian Affairs, 25 C.F.R. § 11.1 (1987). Most of the Tribes are organized with a written constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967 (25 U.S.C. § 503) (hereinafter O.I.W.A.) Some of the Tribes have also incorporated the provisions of the Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 461 et seq.) (Indian Reorganization Act) with Secretarial approval.

Pursuant to these fundamental foundations, these Indian tribes have enacted, and enforce, a myriad of statutes which regulate the conduct of all persons within

the Indian Country subject to the jurisdiction of their particular tribe. Some of the laws enacted by one or more of the tribes include provisions authorizing the incorporation of business and non-profit corporations, removal or discipline of elected tribal officials, the regulation of the gaming industry, regulation of the mineral mining industry including oil and gas mining, regulating security agreements and the filing and enforcement of liens, provisions for the levy and collection of tribal taxes including taxes on all forms of tobacco, regulation of certain industries, provisions providing for public health facilities and public housing, provisions defining the punishment for criminal offenses and providing for police and fire protection, as well as provisions for complete trial and appellate court systems with what is believed to be model tribal laws relating to tribal courts, civil, criminal, appellate, and juvenile procedure, and rules of evidence. Interpreters are provided in the tribal courts when needed.

In addition to these statutory enactments, the courts of these tribes enforce tribal traditions and customs as the common law of the affected tribe in a manner similar to that in which American customs and traditions are enforced as the common law in state and federal courts. Actions relating to marriage, divorce, child custody, guardianships, probate of estates, contract rights, tortious conduct, and requests for relief in equity are not uncommon.

These laws are enforced within the Indian Country of each tribe. This consists, at a minimum, of the trust or restricted allotments and lands owned by the tribe reserved from allotment or acquired in trust by the

United States or restricted against alienation by the United States pursuant to Acts of Congress, 25 U.S.C. §§ 177, 335, 465, 501. Each tribe maintains the position that their original reservation boundaries were not disestablished, or that at worst, their reservation was diminished but not disestablished in the allotment process. This question has not yet been authoritatively determined under the modern definition of Indian Country, or the modern test for reservation disestablishment or diminishment as adopted by this Court in response to the enactment of 18 U.S.C. § 1151.

The Tribes have a direct interest in the outcome of this action insofar as the Oklahoma Tax Commission requests this Court to render a sweeping decision judicially abolishing federally recognized tribal governments and Indian Country without Congressional sanction.

SUMMARY OF ARGUMENT

1. Indian Tribes have always been recognized as being immune from suit absent their consent or the consent of Congress. This immunity is black letter Hornbook law which Congress has taken pains to retain in several statutory enactments. Without an express waiver of the Tribe's sovereign immunity, the Oklahoma Tax Commission cannot prevail.

2. Indian Country is the appropriate, Congressionally approved, term of art to describe the territorial area of tribal self-government. The Potawatomi tribal store is located on a tract of land within the original Potawatomi reservation in what is now Oklahoma. This tract of trust

property is Indian Country, and is subject only to Federal and Tribal jurisdiction.

3. The Oklahoma Tax Commission's attempt to tax the Potawatomi Tribe directly interferes with Tribal self-government and economic development. Oklahoma's attempt to levy and collect taxes from the Tribe reduces Tribal governmental revenues and destroys the ability of the Tribe to create a positive legal infrastructure for economic development with the Indian Country subject to its territorial jurisdiction.

4. Congress has never lifted the Constitutional and statutory pre-emption of state authority concerning the Indian Country of the Potawatomi and other Tribes in Oklahoma. The original framers of the Constitution clearly intended Congress to have exclusive control over trade with the Indians regardless of whether the non-Indian party was buying or selling. While Congress has made provision for certain states to exercise jurisdiction in some cases over non-Indians engaged in such transactions, Oklahoma has not obtained such authorization. In the absence of compliance with the federal prescription for obtaining such authority, Oklahoma cannot divest the Congress of its exclusive authority.

ARGUMENT

I. THE CITIZEN BAND POTAWATOMI HAS COMPLETE SOVEREIGN IMMUNITY FROM OKLAHOMA CLAIMS.

The Oklahoma Tax Commission's arguments attempt to deny the tribes their traditional sovereign immunity. This Court has stated that Congress has plenary power over the tribes but the Court also recognizes that it is Congress which creates shifts in Federal policy towards Indians, not the courts. The courts may not invade the legislative function.

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 97 S.Ct. 2616, 2620-2621, 53 L.Ed. 2d 667 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co.*, supra, 309 U.S. at 512, 60 S.Ct. at 656.
>
> It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976), quoting, *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969).

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

Until such time as Congress determines that it is time to reduce or extinguish the sovereign immunity of the tribes the courts must continue the tribes' protection from unconsented suit, especially from the states. *United States v. Kagama*, 118 U.S. 375 (1886).

II. THE TRACT OF LAND AT ISSUE IS INDIAN COUNTRY SUBJECT TO EXCLUSIVE FEDERAL AND TRIBAL JURISDICTION ABSENT AN ACT OF CONGRESS TO THE CONTRARY

The term "Indian Country" is perhaps first defined by statute in the Act of June 30, 1834, 4 Stat. 729 (1834) as "all that part of the United States . . . to which Indian title has not been extinguished", and included within its terms the area which now comprises the State of Oklahoma. The effect of the early statutes defining Indian Country was summarized by the noted Indian law scholar, Felix Cohen, in his *Handbook of Federal Indian Law* 6 (1942 Ed.) as follows:

> Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all[1].

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[1] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. § 1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and

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Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations". *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations; *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly v. United States*, 228 U.S. 243 (1913), trust and restricted Indian allotments; *United States v. Pelican*, 232 U.S. 442 (1941); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependent Indian communities) although not called a "reservation". *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S 535 (1938).

In *Bates v. Clark*, 95 U.S. 204, 209 (1887), the Court stated:

> It follows from this that all the country described by the act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be Indian Country whenever they lose that

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education) (25 U.S.C. § 231); 25 U.S.C. §§ 232, 233 (New York); 18 U.S.C. § 1162 (criminal jurisdiction in Public Law 83-280 states); 28 U.S.C. § 1360 (civil jurisdiction in Public Law 83-280 states); 25 U.S.C. §§ 1321 et seq. (assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states). Oklahoma was not granted, and has never assumed, jurisdiction over Indian Country within its borders pursuant to Public Law 33-280.

> title, in the absence of any different provision by treaty or by act of Congress.

Although the Indian Country status had been tied to aboriginal ownership of the soil, this Court in *Donnelly* extended the application of the term to lands reserved for tribes carved from the public domain. Tribal ownership, however, remained the benchmark indicia of Indian Country status for Indian reservations as a historical consequence of the 1834 act. In pre-1948 decisions of this and other courts, as well as those cases which rely without critical analysis upon such decisions, the ownership of title to the soil was often critical to the status of land as Indian Country or "reservation" land.

The foregoing decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" or assimilated" reservation) was Indian Country. Cohen, *Handbook of Federal Indian Law* 8 (1942 Ed.). The practical effect of this "open reservation" issue was whether federal and tribal jurisdiction remained exclusive in reservation areas where allotments had been taken and the surplus sold, or where trust periods had expired, or where restrictions against alienation had been removed.

In 1948, Congress resolved this issue in favor of federal and tribal jurisdiction over trust or fee patented lands within reservations, and codified the Supreme Court's existing common law classification of Indian Country by the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. § 1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Oklahoma was not excepted from the terms of this Act. The impact of this Congressional action was to render obsolete Court decisions which tied Indian Country status of Indian lands to issues of land title, and to define by statute the territorial area for the operation of tribal government. The question of continuing land ownership remains relevant only in the context of Indian allotments outside Indian reservations. This Court, while often speaking in terms of "reservation" or "allotment" or "dependant Indian community" as relevant in a particular circumstance has, since 1948, clearly held that "Indian Country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government. *United States v. Mazurie*, 419 U.S. 544, (1975)[2];

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[2] "Cases such as *Worcester*, supra, and *Kagama*, supra, surely established the proposition that Indian tribes within 'Indian Country' are a good deal more than 'private, voluntary organizations.' " *Mazurie* at U.S. 557.

DeCoteau v. District Court, 420 U.S. 425 (1975)[3]; *United States v. John*, 437 U.S. 634 (1978)[4]; *Solem v. Bartlett*, 465 U.S. 463 (1984).[5]

It is obvious that the term "Indian Country" encompasses reservation areas, and the areas enumerated in section 1151 are to be treated equally as those areas are all "Indian Country". The reservation is indeed "Indian

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[3] In footnote 2 of the opinion, the court stated: "If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." While § 1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c)." *Id.* at U.S. 446.

[4] At page 649 of the opinion, the Court stated: "With certain exceptions not pertinent here, § 1151 includes within the term "Indian Country" three categories of land. The first, with which we are here concerned, is [Indian reservations]." In the accompanying footnote 17, the Court stated in part: "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian Country]."

[5] In footnote 8 at page 467 of the opinion the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of congress fall within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

Country", and the laws applicable to the reservation are logically applicable to the areas set out in 1151(b) and (c). *See, DeCoteau v. District Court*, 429 U.S. 425 (1975), *United States v. John*, 437 U.S. 634 (1978), *United States v. Pelican*, 232 U.S. 442 (1914), *United States v. Sandoval*, 231 U.S. 28 (1913).

Every modern Court which has considered the question has determined that "Indian Country" exists in Oklahoma including: (1) restricted allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985), *cert. denied*, 476 U.S. 1106 (1986); (2) trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. 1978) (agreeing with unpublished federal district court decision to the same effect, *see*, 573 P.2d at 264), and (3) tribal trust lands, *compare, State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) cert. den. sub. nom., *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation) *See also; Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *Ahboah v. Housing Authority of Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983), *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990).[6]

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[6] Additionally, there exists in Oklahoma trust and restricted Indian allotments and other Indian lands that constitute "dependent Indian communities" under Section 1151(b). See *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Azure*, 801

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According to Petitioner, the trust land of the Potawatomi at issue herein is not a reservation and therefore not protected from state intrusion. The Tax Commission demonstrates in almost every respect a total misunderstanding of Federal Indian law and the nature of Indian Country. The Petitioner attempts to show that the tract of land does not fit the definition of reservation as that word was used in the 1891 statute.[7] The Tax Commission even goes to the absurd point of criticizing the lower court because it found the land to be Indian Country by only "quoting the text" of this Court's test in *United States v. John*, 437 U.S. 634 (1978) that the land be set apart for the use of Indians as such. There is simply no magic in the use of the term "reservation", since lands set aside for use of Indians because of their status as Indians are Indian Country whether referred to as reservation or by some other term. *United States v. McGowan*, 302 U.S. 535 (1938).

Indian Country, USA, supra, addressed many of the same issues raised yet again by the Tax Commission. In denying state authority to regulate tribal bingo on tribal

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F.2d 336, 339 (8th Cir. 1986); *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971). Oklahoma cases have applied this standard as well to preclude state jurisdiction on Indian lands in Oklahoma. *C.M.G. v. State*, 594 P.2d 798 (Okla.), cert. denied, 442 U.S. 992 (1979) (Chilocco Indian School is a dependent Indian Community and thus "Indian country;" there is accordingly no state juvenile court jurisdiction).

[7] Act of March 3, 1891, ch. 543, § 8, 26 Stat. 1016.

trust lands belonging to the Creek Nation, the Tenth Circuit carefully reviewed the turn of the century legislation and policy that, as with the Potawatomi, conveyed away much of the Creek Nation's land, and which additionally seriously affected the Creeks' government. The court concluded that:

> Although the federal legislation described above seriously undermined the authority of the Creek Nation, we are not persuaded that Congress intended or acted to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma.
>
> . . . The language of the Oklahoma [enabling] act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians and dissolving completely the tribally-owned land base events that never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.

829 F.2d at 978, 979-980. (footnote omitted)

The Tax Commission also ignores the different language used in the two acts conveying the land back to the Potawatomi, Act of Sept. 13, 1960, 74 Stat. 903 and Act of August 11, 1964, 78 Stat. 382, and the third placing it in trust, Act of Jan. 2, 1975, 88 Stat. 1922. The first two

unequivocally state that "title of the tribe" to the lands conveyed "shall be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership." Act of Sept. 13, 1960, 74 Stat. 903, and Act of August 11, 1964, 78 Stat. 392. The third relevant act avoids such language and instead states that the land shall be conveyed "to the United States in trust for the Citizen Band of Pottawatomie." The first two acts had to use very specific language to preclude the land from falling within the definition of Indian Country and thus the special laws that would otherwise apply to tribally owned land.[8] It is beyond reason for the Tax Commission to argue that lands taken into trust for a tribe in Oklahoma are not "Indian country" under 18 U.S.C. § 1151(a).

III. THE STATE IS WITHOUT AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

The federal government maintains a federal policy encouraging Indian economic development and tribal self-government. If the tribal businesses must pay both state and tribal taxes on top of federal taxes, then contrary to the Oklahoma Tax Commission's statements, there is not a level playing field. Instead, economic development in Indian Country would be devastated by having to pay triple taxation, or the Tribal government will have to forego sorely needed tax revenues and its ability

[8] *See* 25 U.S.C. § 177 flatly prohibiting purchase, grant, lease or other conveyance of lands or any claim or title thereto by any tribe unless such alienation was pursuant to treaty or convention pursuant to the Constitution.

to exercise its governmental functions by creating a legal infrastructure within which to conduct trade and other business. *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 388, 96 S.Ct. 2102, 2111 (1976) noted the destructive effect of allowing the tribe to be subject to state and local tax.

State taxes would limit the tribes ability to raise and maximize tribal revenues, to determine whether to make certain property or transactions tax exempt, or to limit taxation of certain property or businesses in order to encourage economic development, all of which would directly infringe on their ability to govern their own affairs.[9] Such taxes frustrate federal efforts to aid Indian Country. Congress annually appropriates approximately one billion dollars a year for Federal Indian programs. Almost half of this appropriation, $500 million, is then immediately pulled back out of Indian Country through federal and state taxes. *id* note 9, p. 188.

The Oklahoma Tax Commission's attempt in this case to assess the Potawatomi taxes in the amount of $2.3 million is substantively and procedurally defective. The State of Oklahoma has neither civil nor criminal jurisdiction within Indian Country. *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990), *Ahboah,* supra. It is absolutely inconceivable that Congress would allow any significant state taxation in areas where the tribes are responsible for both civil and criminal jurisdiction. Furthermore, the responsibility of exercising civil

[9] *See State and Indian Tribal Taxation on Indian Reservations – Is It Too Taxing?,* 1989 Harvard Law Symposium, Susan Williams and Kevin Gover. pp. 180-181. (1990, President and Fellows of Harvard College).

jurisdiction carries with it the responsibility of regulating interactions with both Indian and non-Indian.

The Potawatomi, unlike any state government, are asked to exercise criminal and civil jurisdiction while having tax monies drained by both the federal and state taxing authorities. The State of Oklahoma has revenues drained from only one authority (federal), while tribal governments are responsible for both civil and criminal jurisdiction in the Indian Country within the State. Thus state taxation within "Indian Country" located in Oklahoma has not been allowed or authorized by Congress.

A key consideration in determining the authority of a state to tax within "Indian Country" is whether the state has civil and criminal jurisdiction. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 178-179 (1973), the Court, in dealing with such a situation, explained:

> . . . a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians . . . *But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected* . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention . . . the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case. (Emphasis added).

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in "Indian Country". *Bryan v. Itasca County*, 426 U.S. 373 (1976). But there has never been any case

which has held that a state may tax Indians within any part of "Indian Country" where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power.

Neither *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) nor *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), involved tribes which provided services to the taxpayers. But in Oklahoma the Potawatomi provide the protection of its civil laws to all individuals doing business within its jurisdiction. This protection and exercise of jurisdiction extends to both Indian and non-Indian alike.

Requiring the Tribes to provide both civil and criminal protection within its jurisdiction while draining tax monies to sources outside that jurisdiction is unconscionable. A tribe's interest compared to others in raising revenue for essential government programs is stronger when the taxpayer is the recipient of tribal services. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). This is especially true when as in this case the tribe is the taxpayer. The State of Oklahoma argues for the right to extract tax monies from the Potawatomi jurisdiction while the burden of exercising civil and criminal jurisdiction is on the Tribe. This frustrates tribal self-government and therefore state taxation is not allowed. *Williams v. Lee*, 358 U.S. 217 (1959). Further, the same federal preemption barrier to State taxation which existed in *McClanahan* is present in this case.

The brief of the Tax Commission argues that the Indian Reservations in Oklahoma have been disestablished pursuant to the Dawes Severalty Act. Brief of Pet.

at pp. 13-21. This ignores two fundamental facts. First, what now comprises the State of Oklahoma required two separate allotment acts to deal with all the tribes in Oklahoma. The Dawes act by its own language did not affect the Five Civilized Tribes in Indian Territory and thus could not change the nature of their reservations. On the other hand, the Commissioner's reports referenced in Petitioner's brief did not apply to the Citizen Band Potawatomi or other Tribes located in what was, at that time, the Oklahoma Territory. Second, to quote from this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-479 (1976):

> The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era: 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust period expired, the reservation *could* be abolished . . . The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act.' citing *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245 (emphasis added).

In *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988) the appellate court relied upon this Court's holding in *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) for the effects of a general repealer clause in a statute dealing with Indians

> [T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. [S]tatutes are to be construed liberally

> in favor of the Indians, with ambiguous provisions interpreted to their benefit. If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts.

Muscogee (Creek) Nation v. Hodel, 851 F.2d, at 1445. (citations omitted.)

Thus, even to the extent some Indian Tribes in eastern Oklahoma (the "Indian Territory") lost a portion of their governmental powers at the end of the last century, the O.I.W.A. restores the Indian Tribes in Oklahoma to their original exclusive jurisdiction over those transactions occurring within their country to the exclusion of the state. At a minimum the O.I.W.A. requires the state to show an affirmative subsequent Congressional delegation of authority to the state to enter the Indian Country within Oklahoma. The state has yet to show that it has received such a Congressional grant of power, except for the above discredited reliance on the Allotment Acts. In other words, prior to the creation of the State of Oklahoma, the Tribes exercised undiminished and exclusive authority in civil matters arising in their country for the simple reason that no state existed to challenge that authority. Given the prohibition against assertion of state jurisdiction imposed by the Oklahoma Enabling Act, and the failure of the Oklahoma Tax Commission to show any explicit general Congressional grant of authority to tax or regulate trade with the Indians since statehood in 1907, the State's position must fail.

IV. OKLAHOMA CANNOT TAX THE SALE OF CIGARETTES BY THE POTAWATOMI TRIBE BECAUSE CONGRESS HAS NEVER DISSOLVED THE FEDERAL PRE-EMPTION BARRIER TO STATE JURISDICTION.

The Oklahoma Tax Commission would have the Court believe that this controversy is solely one of State vs. Tribal authority. In truth, it is a question of the authority of the Federal government vis-a-vis the State.

Article I, Section 8, Clause 3 of the Constitution of the United States vests the sole power to control commerce between citizens or subjects of the United States and the Indian Tribes exclusively in the Congress of the United States. The founding fathers explained their reasons for vesting such authority exclusively in Congress instead of a sharing arrangement with the States – as had been the case under the Articles of Confederation – in the following manner:

> [T]he prospect of present loss or advantage, may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. . . . Not a single Indian war has yet been occasioned by the aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . .

See, The Federalist No. 3, p. 43-44 (C. Rossiter ed. 1961) (NAL Penguin, Inc. Publisher), and further:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain.

See, The Federalist No. 42, pp. 268-269 (C. Rossiter, ed. 1961) (NAL Penguin, Inc. Publisher). Far from allowing the situation occasioned by the Articles of Confederation to remain, the Constitutional Convention intentionally framed the Commerce Clause to remove from the States all authority concerning commerce with the Indian Tribes by non-Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Kennerly v. District Court*, 400 U.S. 424 (1971), the Court recognized that Public Law 83-280, 28 U.S.C. §1360 as amended by 25 U.S.C. §1322 was a "governing Act of Congress" concerning state authority to regulate matters

involving Indians in the Indian Country thereby precluding reliance on an "infringement test" or application of a balancing test. Simply stated, Congress intended that States comply with this act in order to acquire jurisdiction over commerce with Indians in the Indian Country.

> Examination of the Federal statutes and State Constitutions have revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are . . . Oklahoma. . . . *Effect of the disclaimer of jurisdiction over Indian land within the borders of these States* – in the absence of consent being given for future action to assume jurisdiction – *is to retain exclusive Federal jurisdiction until Indian title to such lands is extinguished*. (emphasis added).

S. Rep. No. 699, 83rd Cong., 1st Sess., 1953 U.S. Code Congressional and Administrative News 2409, 2412 (legislative history).

This statute, commonly referred to as P.L. 83-280, expressly extends the civil and criminal laws having general application to all persons and property within the State into the Indian Country within the states subject thereto, with certain limitations as to the application thereof to Indians of the affected Indian Country. This statue, then, is the sole Congressionally authorized general mechanism for states to exert authority over commerce with Indians in the Indian Country.

It is absolutely clear that with rare exception Congress has not allowed the taxation of Indians in "Indian Country" by a state. *Montana v. Blackfeet*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136

(1980); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *McClanahan*, supra. Nor may a state generally tax Indians in "Indian Country" even if a state has assumed criminal and civil jurisdiction over "Indian Country". *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). Apparently, however, if a state has general civil and criminal jurisdiction within "Indian Country" pursuant to P.L. 83-280, that state may tax non-Indians in "Indian Country" if the tax burden does not frustrate tribal self-government or federal policy. *McClanahan*, supra, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Moe* and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) the Court allowed a tax on non-Indians. In *Moe*, the tax on non-Indians did not frustrate tribal self-government and was not prohibited by the federal preemption barrier which had been removed by P.L. 83-280, 28 U.S.C. § 1360 as amended and supplemented by 25 U.S.C. § 1322. The Oklahoma Tax Commission is not in a situation similar to *Moe* and *Colville* because the Tax Commission has taxed the tribe directly through an assessment, and because Oklahoma have never obtained jurisdiction over non-Indians involved in commerce with Indians in the Indian Country via P.L. 83-280.

The Tenth Circuit decision correctly dismissed the arguments of the Oklahoma Tax Commission regarding *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). That portion of the 10th Circuit's decision correctly noted the distribution of jurisdiction

between the tribes, the state and the federal government in Oklahoma. The decision in *Colville* is irrelevant in this case because it relies upon *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) which in turn is grounded upon the fact that the ability of the state to tax non-Indians engaged in transactions with Indians came from the grant of authority from Congress found in Public Law 83-280. In *Moe*, the non-Indian was liable for the tax because Congress had not exempted taxation of non-Indians when the general Commerce clause preemption was removed by Public Law 83-280.[10] The non-Indian, because Congress had made state law specifically applicable to him, would be committing a crime by possession of unstamped cigarettes. These cases simply do not apply unless Congress has made state law applicable within the Indian country in question because no crime would be committed.

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[10] *See, Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), in which the opposite result was reached, i.e. a white person was not taxable by the state regarding transactions with Indians in Indian country, in a state where the federal preemption barriers to state tax law as to non-Indians had not been removed by Public Law 83-280. To attempt to create differences in the nature of goods such as cigarettes and other items that are imported into Indian Country for resale defies logic. The Warren Trading Post clearly imported processed goods into the Indian country simply to resell them. The only logical and consistent legal underpinning of these cases, even if disavowed by this Court, flows directly from the decision of Congress, expressed by statute, to allow state tax laws to apply to non-Indians within particular Indian country areas at issue in *Moe* and *Washington*.

Therefore, the real issue here is whether Congress or the Oklahoma Tax Commission have the authority to regulate commerce between the Citizen Band Potawatomi and subjects or citizens of the United States. Simply stated, the Constitution vests Congress with the exclusive authority to regulate such activities. Although Congress has provided Oklahoma a mechanism to share in that authority in part, Oklahoma has not seen fit to amend its Constitution or enact specific legislation to comply with the conditions required by Congress for the acquisition of such authority.

The previous "cigarette tax cases" of this Court are not to the contrary because in each case the State had acquired jurisdiction as to "all persons and property" in the Indian Country affected through Public Law 83-280 with the exceptions noted by this Court in those cases. It would indeed be oxymoronic to recognize, on the one hand, that Tribal sovereignty is subject only to the authority of Congress, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982), and to allow, on the other hand, intrusion by the State into the Tribe's territorial jurisdiction as established by Congress, and subjugation of the Tribe's rights to self-government to the governing authority of a State without the consent of the Tribe or Congress.

CONCLUSION

If the Court is to remain faithful to the intent of the framers of the Constitution, it must uphold the authority of Congress alone to regulate commercial transactions

involving Indians in the Indian Country and affirm the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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